Supreme Court, U.S.
FILED

10-828 DEC 21 2010

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

MICHAEL MEAD,

Petitioner,

v.

CITY OF COTATI a municipal corporation; PLANNING COMMISSION OF THE CITY OF COTATI; UNITED STATES FISH AND WILDLIFE SERVICE; DONALD KOCH, in his capacity as Director of the California Department of Fish and Game,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MERIEM L. HUBBARD
Counsel of Record
PAUL J. BEARD II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org
E-mail: mlh@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), require that conditions on development be related in nature and extent to the projected impact of a proposed development.

1. Does a land-use exaction that would be struck down as an unconstitutional condition under *Nollan* and *Dolan* if it is imposed as a required dedication of real property, become constitutional if the property owner is given the option of ransoming his land by offering a monetary payment to the government?

2. Does a land-use exaction that would be struck down as an unconstitutional condition under *Nollan* and *Dolan* if it were adjudicatively imposed upon a single individual, become constitutional if it is legislatively imposed upon all similarly situated property owners?

LIST OF ALL PARTIES

Petitioner: Michael Mead

Respondents: City of Cotati, a municipal corporation; Planning Commission of the City of Cotati; United States Fish and Wildlife Service; Donald Koch, in his capacity as Director of the California Department of Fish and Game.

CORPORATE DISCLOSURE STATEMENT

This brief is filed on behalf of an individual; it is not filed by or on behalf of a nongovernmental corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

A. Factual Background 3

B. Judicial Proceedings 4

REASONS FOR GRANTING THE WRIT 6

I. WHETHER THE NEXUS AND ROUGH PROPORTIONALITY TESTS OF *NOLLAN* AND *DOLAN* APPLY TO FEES REQUIRED IN-LIEU OF DEDICATION OF PROPERTY 7

A. The Issue 7

B. The Conflict 9

1. State Courts of Last Resort That Apply *Nollan* and *Dolan* to Monetary Exactions Distinguish Between Fees Imposed as an Alternative to Dedication and Fees Imposed for Other Purposes 9

TABLE OF CONTENTS—Continued

Page

2. Other State High Courts Hold That *Nollan* and *Dolan* Only Apply Where Government Requires the Dedication of an Interest in Real Property 12

C. The Appropriateness of Resolving the Issue Now 14

II. WHETHER *NOLLAN* AND *DOLAN* APPLY TO EXACTIONS IMPOSED BY BROADLY APPLICABLE LEGISLATION IS AN IMPORTANT QUESTION OF FEDERAL LAW, AND A MATTER OF CONFUSION IN THE LOWER COURTS . . 20

CONCLUSION 24

APPENDIX

A. Memorandum (9th Cir. July 22, 2010) A-1

B. Order Granting Defendants' Motions to Dismiss (N.D. Cal. Nov. 19, 2008) B-1

C. Judgment (N.D. Cal. Dec. 10, 2008) . . . C-1

D. Order Denying Rehearing En Banc (9th Cir. Aug. 30, 2010) D-1

E. City of Cotati Municipal Code— Title 17—Land Use Code E-1

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States,
364 U.S. 40 (1960) 21, 24

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 12

City of Olympia v. Drebick,
126 P.3d 802 (Wash. 2006),
cert. denied, 549 U.S. 988 (2006) 11

Dolan v. City of Tigard,
512 U.S. 374 (1994) . . . . . passim

Ehrlich v. City of Culver City,
15 Cal. App. 4th 1737 (1993),
vacated and remanded,
512 U.S. 1231 (1994) 11, 14

Ehrlich v. City of Culver City,
911 P.2d 429 (Cal. 1996) 10-11

Garneau v. City of Seattle,
147 F.3d 802 (9th Cir. 1998) 9

Home Builders Ass'n of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997),
cert. denied, 521 U.S. 1120 (1997) 13, 20

Krupp v. Breckenridge Sanitation District,
19 P.3d 687 (Colo. 2001) 12-13

Lambert v. City & County of San Francisco,
529 U.S. 1045 (2000) 8, 15-16

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 8, 16, 22-23

TABLE OF AUTHORITIES—Continued

Page

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) 19

McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995) 13

McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009) 5, 9, 16-17, 20

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) . . . . . i, 2, 5, 7-8, 20

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 5-6

San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87 (Cal. 2002) 20

Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 548 S.E.2d 595 (S.C. 2001) 12

Simpson v. City of North Platte, 206 Neb. 240, 292 N.W.2d 297 (1980) 19

Smith v. Town of Mendon, 822 N.E.2d 1214 (N.Y. 2004) 10

Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004) 10, 12, 20

Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994) 11

TABLE OF AUTHORITIES—Continued

Page

Twin Lakes Dev. Corp. v. Town of Monroe, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) 9

Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712 (Md. 1994) 13

West Linn Corporate Park, L.L.C. v. City of W. Linn, 2010 Ore. LEXIS 726 (2010) 21

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 5

Constitution

U.S. Const. Amend. V 19

Federal Statutes

28 U.S.C. § 1254 1

§ 1331 1

State Statutes

Cal. Gov't Code § 66020 (2010) 4

Municipal Codes

Cotati Muni. Code, § 17.31.020, *et. seq.* 3

Miscellaneous

Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523 (1999) 19

TABLE OF AUTHORITIES—Continued

Page

Kent, Michael B., Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 Wm. & Mary L. Rev. 1833 (2010) 14, 18

McCutcheon, Stephen R., Jr., *Lessened Protection for Property Rights—The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test*, 27 Pac. L.J. 1657 (1996) 15

Watson, Matthew S., *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 Whittier L. Rev. 181 (1998) 15

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Mead respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The panel memorandum opinion of the Ninth Circuit Court of Appeals is not reported; it appears at Appendix A to the petition. The order of the United States District Court for the Northern District of California granting motions to dismiss is not reported; it appears at Appendix B to the petition. The Judgment of the lower court appears at Appendix C to the petition.

JURISDICTION

The district court had jurisdiction to review this case pursuant to 28 U.S.C. § 1331. The decision of the Ninth Circuit Court of Appeals was entered on July 22, 2010. Petition Appendix (Pet. App.). at A-1. That decision became final on August 30, 2010, upon entry of the Court's denial of a petition for rehearing en banc. Pet. App. at D-1. On November 22, 2010, Justice Kennedy granted petitioner's timely application to extend the time within which to file the petition to December 23, 2010. No. 10A487. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[P]rivate property [shall not] be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner Michael Mead obtained a permit to build four duplexes—eight individual units—on his property in the City of Cotati, California. Among the conditions imposed on the building permit, is that Mr. Mead comply with the City's affordable housing program by dedicating two units as moderate, low, or very low-income housing. Alternatively, he can pay a fee in-lieu of dedicating the units. Mr. Mead challenged the condition as an unconstitutional taking of private property, because the City did not, and could not, demonstrate that four new duplexes had any impact on the lack of affordable housing, such that Mr. Mead must dedicate two units as mitigation. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Mr. Mead did not prevail in the lower federal courts, and now he seeks review from this Court to settle an important question of federal constitutional law that has plagued the lower courts since *Nollan* was decided in 1987.

A. Factual Background

Mr. Mead owns 1.6 acres of vacant land on contiguous lots located in Cotati, California. Mr. Mead applied to the Cotati Planning Commission for a permit to build four duplexes (a total of eight units) on 0.9 of an acre of his property. The City of Cotati granted the permit with conditions imposed to mitigate the purported impact of the project on the lack of affordable housing.[1] The Cotati Municipal Code, Section 17.31.020, *et. seq.* requires a residential building applicant to provide low-income housing in one of three ways: (1) an applicant may construct at least twenty percent of his total units as below-market units restricted for occupancy by moderate, low, or very low income households; (2) an applicant building nine or fewer units may pay an in-lieu fee to the City; or (3) an applicant may seek permission from the City to construct the required below-market units off-site, dedicate land to the City for its construction of below-market units, or provide a combination of on-site and off-site construction, in-lieu fees, and land dedication. Pet. App. E-2-6.

The resolution granting Mr. Mead's permit application, with conditions, does not specify which option Mr. Mead must utilize to comply with the affordable housing condition, or when he must make that decision. Pursuant to Section 17.31.020, Mr. Mead can dedicate two units (20% of eight units equals 1.6 units, which rounds up to two units) for sale or rent to lower-income households. Mr. Mead may

---

[1] A second condition requiring mitigation for the potential loss of California Tiger Salamander habitat was challenged below, but Petitioner only seeks this Court's review of issues pertaining to the affordable housing condition.

instead choose to pay an in-lieu fee tied directly to the price of the market-rate units. Pet. App. E-5. If he were to choose to pay an in-lieu fee, Mr. Mead would have to submit to the City an appraisal report on the built units in order to determine fair-market value. Mr. Mead did not ask to satisfy the affordable-housing condition by constructing the required below-market units off-site or by dedicating land to the City for construction of the desired below-market units.

Mr. Mead protested the affordable housing condition at every stage of the local approval process. He asked that the condition be waived; his request was denied. He objected to the condition on federal constitutional grounds, and requested that the City comply with the administrative appeal process described in documents approving his project and required by the California Mitigation Fee Act, Cal. Gov't Code § 66020 (2010). But the City would not allow an administrative appeal.

B. Judicial Proceedings

After unsuccessfully seeking an administrative appeal, Mr. Mead timely filed this inverse condemnation action against the City, alleging that the affordable housing condition imposed on his development project violates the Takings Clause of the Fifth Amendment to the United States Constitution. Mr. Mead sought a declaration that the affordable housing condition fails to satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*. [2]

---

[2] Mr. Mead also challenged a condition that he mitigate the impact of his proposed development project on the California Tiger Salamander. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of that claim, and Mr. Mead does not now

(continued...)

The District Court for the Northern District of California granted the respondents', motions to dismiss Mr. Mead's claims, without reaching the merits of the case. As to the affordable housing condition the district court ruled: (1) Mr. Mead must seek a compensation remedy because a taking is not unconstitutional unless it is uncompensated, and (2) the *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), state procedures prong requires that Mr. Mead seek compensation though an inverse condemnation action in the California courts prior to filing a claim in federal court. Pet. App. B-15-21.

Although the two issues set out above were extensively briefed on appeal, the Ninth Circuit Court of Appeals did not rule on either. Instead, the court, relying on *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009), assumed without deciding that the takings claim protesting the affordable housing condition was ripe. Pet. App. A-4. But the Court rejected Mr. Mead's claim on the merits. Observing that Mr. Mead had an option to comply with the condition by paying an in-lieu fee, and again citing *McClung*, the Court held that "[a] generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)." Thus, under *McClung*, the claim should have been brought under the multi-factor test of *Penn Central*

---

[2] (...continued)
seek review of the issues relating to the required mitigation for loss of salamander habitat.

Transportation Co. v. New York City, 438 U.S. 104 (1978). Pet. App. A-4-5.

As a result of the ruling in this case, and others like it, the *Nollan/Dolan* takings standards apply only in the increasingly rare situation where an individually imposed condition on development requires the dedication of real property or an interest in real property. The Ninth Circuit Court is not alone in refusing to apply *Nollan* and *Dolan* to conditions imposed via legislation of general applicability or to conditions in the form of fees. But Petitioner is not aware of another instance where a court has refused to apply a *Nollan/Dolan* analysis merely because a property owner has an option to pay a fee in-lieu of dedicating property. The ruling further erodes the *Nollan* and *Dolan* standards to the point where the exceptions swallow the rule.

Mr. Mead timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

On two important questions of takings law, the court below issued decisions that are in conflict with the decisions of this Court and various state high courts. These conflicts warrant resolution by this Court.

I

WHETHER THE NEXUS AND ROUGH PROPORTIONALITY TESTS OF *NOLLAN* AND *DOLAN* APPLY TO FEES REQUIRED IN-LIEU OF DEDICATION OF PROPERTY

All fees imposed as a condition of development are not the same. Petitioner does not request that this Court accept review of this case to decide that all conditions taking the form of fees should be analyzed under the standards of *Nollan* and *Dolan*. Instead, Petitioner asks this Court to review the question whether fees imposed as a direct alternative to a required physical dedication are so closely connected to the dedication itself as to warrant scrutiny under *Nollan* and *Dolan*. A number of state high courts distinguish between in-lieu fees and other sorts of fee conditions.

A. The Issue

Nollan and *Dolan* establish a searching standard of judicial scrutiny for regulatory takings claims whereby a court must resolve two questions. First, is there a close connection between a permit condition and the public harm it is intended to mitigate? *Nollan*, 483 U.S. 825, 837; *Dolan*, 512 U.S. at 386. Second, if there is a close connection, does the required degree of connection exist between the condition and the projected impact of the proposed development? *Dolan*, 512 U.S. at 388.

Government regulation in *Nollan* took the form of an exaction. The California Coastal Commission imposed a condition requiring the property owner to dedicate a strip of beach in order to obtain a permit to

rebuild his house. *Id.* at 827-28. This Court held that there must be a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

Seven years later, in *Dolan*, 512 U.S. 374, this Court defined how close a "fit" is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. Where a nexus is found, there must also be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—"some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added). Together, these tests ensure that property owners are not subjected to extortionate conditions on development. *See Nollan*, 483 U.S. at 837; *see also Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1048 (2000) (Justices Scalia, Kennedy, and Thomas dissenting to denial of certiorari) ("The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion.'") (citations omitted).

In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005), this Court described the regulatory takings tests that are valid under current law, and affirmed the viability of the *Nollan/Dolan* takings theory. But this Court has not provided any direction as to the

scope of the theory. Twenty-three years after *Nollan* there is still no consensus on the application of the "nexus" and "rough proportionality" standards to conditions on development allowing for the payment of fees, including fees in-lieu of dedication. The result is a deeply divided split of authority among the state high courts. *See, e.g., McClung*, 548 F.3d at 1225 ("Other courts addressing this general issue have come to different conclusions."); *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (The court noted that the parameters of the *Nollan* and *Dolan* tests have not been defined by the Supreme Court.).

B. The Conflict

1. State Courts of Last Resort That Apply *Nollan* and *Dolan* to Monetary Exactions Distinguish Between Fees Imposed as an Alternative to Dedication and Fees Imposed for Other Purposes

New York: The high court of New York applies *Nollan* and *Dolan* to fees that are required in-lieu of the dedication of property. In *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004), a developer challenged the town's "in lieu of parkland" fees arguing that it violated *Dolan*'s rough proportionality test. The court noted that both parties agreed that the developer's challenge to the town's per-lot recreation fee was governed by *Dolan*'s rough proportionality test. *Id.* at 825. Applying *Dolan*'s rough proportionality analysis to the park fees, the court found that the town's legislative "findings" were sufficient and therefore no taking had occurred. *See id.*

In *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004), the New York court explained that it had extended the *Nollan/Dolan* standards to cases where government requires a transfer of property and in *Twin Lakes*, where a fee was imposed in-lieu of a physical dedication. *See id.* at 1219. ("Outside of these two narrow contexts, neither the Supreme Court nor this Court has classified more modest conditions on development permits as exactions.").

Texas: The Supreme Court of Texas, in a case involving the dedication of money for road improvements, found no reason to limit application of *Dolan* to dedications of land. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635 (Tex. 2004). The Texas Court explained that "the Supreme Court did not, we think, intend to suggest that all regulatory takings cases must fall into one category or the other. The requirement that a developer improve an abutting street at its own expense is in no sense a use restriction; it is much closer to a required dedication of property—that being the money to pay for the required improvement." *Id.* The Texas court concluded that there is no reason to analyze monetary exactions differently than dedications when determining if a taking has occurred. *Id.*

California: In *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996), the California Supreme Court applied *Nollan* and *Dolan* to in-lieu fees imposed as a condition of development.[3] The owner of a private tennis club and recreational facility applied to the City

---

[3] This California Supreme Court decision resulted from an appeal of the decision of the California Court of Appeal after remand from this Court.

of Culver City for an amendment to a general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1743 (1993), *vacated and remanded*, 512 U.S. 1231 (1994). The City approved the application conditioned upon the payment of certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities. *Id.* The California Supreme Court explained that "it matters little whether the local land use permit authority demands the actual *conveyance* of the property or the *payment* of a monetary exaction." *Ehrlich*, 911 P.2d at 444. The City could not have required Ehrlich to dedicate the same amount of land for public recreational facilities, and if the City determined that a restricted land-use transfer was impracticable, it could levy an in-lieu fee to accomplish the same objective. *Id.* at 449.

Washington: In *Trimen Dev. Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994), the Washington Supreme Court held that *Dolan* applies to a generally applicable ordinance imposing park development fees. *But see City of Olympia v. Drebick*, 126 P.3d 802, 807-10 (Wash. 2006), *cert. denied*, 549 U.S. 988 (2006) (distinguishing) fees paid in-lieu of possessory exactions that are subject to *Nollan/Dolan* from general infrastructure fees that are not.

2. Other State High Courts Hold That *Nollan* and *Dolan* Only Apply Where Government Requires the Dedication of an Interest in Real Property

South Carolina: In *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001), owners of a private fishing pier sued the city for a temporary regulatory taking of the pier. The Supreme Court of South Carolina cited this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for the proposition that *Dolan*'s rough proportionality test applies only to physical exactions. *Sea Cabins*, 548 S.E.2d at 603 n.5. The South Carolina court noted that, prior to *Del Monte Dunes*, "there was considerable debate as to whether the *Nollan/Dolan* tests applied to more than regulations mandating physical exactions." *Id.*[4]

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee imposed on a residential townhouse project. The court adopted a very narrow interpretation of *Nollan* and *Dolan* that limits application of the nexus and rough proportionality tests to a narrow set of cases involving property exactions and discretionary adjudicative

---

[4] In fact, considerable debate remains today. In *City of Monterey*, this Court merely distinguished excessive exactions from the denial of development. *See City of Monterey*, 526 U.S. at 702-03; *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d at 635-36.

determinations specific to one landowner and one parcel of land. *Id.* at 695-97.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997). The court said that *Dolan* was not applicable because the reasonableness of the fee was not raised at the trial court, and even if it had been raised, this case was distinguishable from *Dolan*. The City of Tigard demanded an exaction of property from Mrs. Dolan, whereas in this case, Scottsdale sought only a fee. *Id.* at 1000.

Kansas: *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995), involved a challenge by property owners seeking to invalidate the city's ordinance imposing traffic impact fees. The court upheld the impact fees, noting that *Dolan* involved the dedication of portions of property to the city. *Id.* at 845. "There is nothing in [*Dolan*], however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee." *Id.* A "critical leap" would be required to apply *Dolan* to an exaction in the form of a fee. *Id.*

Maryland: *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994). The Montgomery County Council adopted a development impact "fee," which it later changed to a development impact "tax." *Id.* at 714. The developers argued that the tax was actually an assessment, and that the assessment was subject to *Dolan*. *Id.* at 723-24. The court disagreed. The court limited *Dolan* to its view of the facts, explaining that the "development impact tax" at issue in the case was adopted by legislative

enactment and did not require landowners to deed portions of their property to the County. *Id.* at 724.

The choice of some state courts to apply different constitutional tests based on the form of an exaction ignores the policy problems *Nollan* and *Dolan* were intended to resolve. The close nexus and rough proportionality tests formulated by those cases seek to prevent coercive and unfair government behavior when a property owner must obtain government's permission to use property in a particular way. The use of arbitrary distinctions to apply a less exacting standard of review to fees can result in exactions unrelated to the impact of development. Indeed, local governments will always provide permit applicants the choice of paying fees in-lieu of dedicating property if the mere existence of the fee option precludes a constitutional challenge to the condition. *See* Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 Wm. & Mary L. Rev. 1833, 1859 (2010) (A rule that subjects physical exactions to nexus and proportionality standards, but completely exempts monetary exactions from the same limitations, does nothing to curtail the problems identified in the Court's exactions cases.)

C. The Appropriateness of Resolving the Issue Now

Over the years, this Court has hinted that fees imposed on development should be analyzed under *Nollan* and *Dolan*. After granting certiorari in *Ehrlich*, 512 U.S. 1231, a case involving the imposition of fees imposed as a condition of development, this Court vacated the judgment of a California appellate court, and remanded the case for consideration under *Dolan*, 512 U.S. 374. This lead some commentators to believe

that this Court approves of the application of nexus and rough proportionality to monetary exactions. *See* Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights—The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test*, 27 Pac. L.J. 1657, 1675 (1996) ("[T]he remand of *Ehrlich* intimates that the nexus and rough proportionality requirements . . . may be applicable to permits conditioned upon monetary exactions . . . ."); *see also* Matthew S. Watson, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 Whittier L. Rev. 181, 205 (1998) ("The *Ehrlich* remand seems to indicate the new exaction test refined in *Dolan* is just that—a new exaction test, not merely a new physical exaction test.").

In a dissent from denial of certiorari in *Lambert v. City and County of San Francisco*, 529 U.S. 1045, three current Justices of the Supreme Court explained that the *Nollan/Dolan* tests apply equally to land and non-land exactions. *Id.* at 1047-48. In *Lambert*, the City and County of San Francisco conditioned petitioners' permit to convert their hotels' residential units to full tourist use on the payment of a $600,000 fee. The fee would be used to replace the residential units "lost" to the conversions. Petitioners refused to pay, and their permit was denied. They challenged the condition under *Nollan* and *Dolan* and lost in the lower courts. The Supreme Court denied review, and Justices Scalia, Kennedy, and Thomas dissented:

> When there is uncontested evidence of a demand for ***money or other property***—and still assuming that denial of a permit because of failure to meet such a demand

> constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.

Id. at 1047-48 (emphasis added).

Finally, in *Lingle*, 544 U.S. 528, this Court acknowledged the continuing viability of the *Nollan* and *Dolan* standards in the context of development conditions generally. "[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Id.* at 548. But the Court did not provide any clarification as to the scope of the tests, and added some ambiguity by emphasizing that *Nollan* and *Dolan* involved demands that a landowner dedicate an easement allowing public access to private property. This Court noted that "both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 546-47. The result is that some courts interpret *Lingle* as limiting the application of *Nollan* and *Dolan* to cases with similar facts—conditions involving adjudicative, individual determinations requiring the dedication of property as a condition of development. An example is the Ninth Circuit Court's decision in *McClung v. City of Sumner*, upon which the decision in this case was based. *See McClung*, 548 F.3d at 1226-27.

The *McClung* decision illustrates the confusing state of takings law as it applies to development

conditions. The City of Sumner required that the property owner replace an underground storm pipe on the property with a larger storm pipe, a project that would cost around $50,000. The Ninth Circuit Court held that "a legislative, generally applicable development condition that does not require the owner to relinquish rights in real property, as opposed to an adjudicative land-use exaction" should be analyzed under *Penn Central*, not *Nollan* and *Dolan*. *McClung*, 548 F.3d at 1222. Then, in a footnote, the court seemed to hedge. It noted that the permit condition—installing larger underground storm pipes—was imposed pursuant to an ordinance adopted and designed to mitigate considerable flooding in the past, and

> [w]e are not confronted, therefore, with a legislative development condition designed to advance a wholly unrelated interest. We do not address whether *Penn Central* or *Nollan/Dolan* would apply to such legislation.

Id. at 1222 n.3.

The court suggested that a challenge to a condition clearly related to the impact of new development should be brought under *Penn Central* (presumably because it would fail a *Nollan/Dolan* analysis), but a condition where the relationship is unclear could be brought under a *Nollan/Dolan* theory, even if it is imposed via legislation of general applicability. This sort of confusion demonstrates the analytical difficulties encountered when the application of *Nollan* and *Dolan* is determined by the form of a condition on development (fees, an interest in

property, or providing public facilities) and the manner by which it is imposed (individually or legislatively).

The condition at issue in *McClung* was unlike the one at issue in this case where Mr. Mead is required to dedicate property—two duplex units—to further the City's affordable housing goals, or pay a fee in-lieu thereof. The facts of this case are much closer to those of *Nollan* and *Dolan*. Michael J. Kent, Jr., an associate professor of law at Atlanta's John Marshall Law School, notes that "an 'in-lieu' fee imposed as a direct alternative to a required physical dedication looks like an exaction because of its inextricable connection to the dedication itself." *See* Kent, *supra*, at 1839. Professor Kent distinguishes in-lieu fees from impact fees, which "are not linked to a would-be dedication" and which share characteristics with various types of government financing mechanisms. *See id.* at 1839.

Exactions in the form of in-lieu fees share the characteristics of exactions demanding property, which clearly give rise to takings concerns: (1) leveraging the governments' police power to require conditions in exchange for the right to develop property, (2) forcing some individuals to bear the burden of solving a public problem that may exist outside the developed property, and (3) impeding a property owner's ability to move forward with his project. *See id.* at 1853-57. These similarities are demonstrated in this case where Mr. Mead is presented with two alternatives—build duplex units that must be dedicated to further the City's affordable housing goals or pay a fee that will be used for the same purpose. Clearly, the affordable housing shortage in Cotati was not created by Mr. Mead, and the City has not demonstrated that building eight new duplex units will in any way

exacerbate the problem; to the contrary, by increasing the supply of housing units, Mr. Mead's project can only help to make housing more affordable overall. Thus, there is a serious question as to whether there is any justification for the City to impose this burden on Mr. Mead, or whether the condition is "'merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.'" *Dolan*, 512 U.S. at 390 (quoting *Simpson v. City of North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980)).

The Fifth Amendment itself does not distinguish between the kinds of property that may be taken or the manner by which property is taken. U.S. Const. amend. V. Some courts and legal scholars conclude that *Nollan* and *Dolan* show this Court's intent to set out principles for all property and land use regulation matters. *See, e.g., Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). ("[T]he Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test."); and David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 567 (1999). (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.). Petitioner urges this Court to grant review of this case to resolve one aspect of the long-standing debate about the proper role of *Nollan* and *Dolan* in regulatory takings law.

II

WHETHER *NOLLAN* AND *DOLAN* APPLY TO EXACTIONS IMPOSED BY BROADLY APPLICABLE LEGISLATION IS AN IMPORTANT QUESTION OF FEDERAL LAW, AND A MATTER OF CONFUSION IN THE LOWER COURTS

Courts throughout the country are split over the question of whether legislatively imposed exactions are subject to *Nollan* and *Dolan* review; however, as this case demonstrates, courts are increasingly choosing to limit *Nollan* and *Dolan's* application to adjudicatively imposed conditions on development. *Compare*, *e.g.*, *Town of Flower Mound*, 135 S.W.3d at 635, 641-42 (refusing to adopt a distinction between adjudicatively and legislatively imposed exactions) *with Home Builders Ass'n of Cent. Arizona*, 930 P.2d 993, *cert. denied*, 521 U.S. 1120 (*Dolan* does not apply to generally applicable exactions); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002) (*Nollan* and *Dolan* do not apply to legislatively imposed exactions); *Mead v. City of Cotati*, Pet. App. A-4 (*citing McClung*, 548 F.3d at 1225-28). Since these cases all involve the protected constitutional right to be free from uncompensated takings of private property, it is important that this Court offer clarification on this question. This is especially true in light of the fact that there is good reason to be concerned that this case, and similarly decided cases, conflict with *Nollan* and *Dolan*.

Firstly, both *Nollan* and *Dolan* involved legislatively imposed exactions. *See Nollan*, 483 U.S. at 859 (Brennan, J., dissenting.) (Pursuant to the California Coastal Act of 1972, "stringent regulation of

development along the California coast had been in place at least since 1976" and, in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract."); *Dolan*, 512 U.S. at 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). Therefore, decisions holding that *Nollan* and *Dolan* are inapplicable when an exaction is imposed by a legislative body, like the City of Cotati, are adding confusion to federal takings law. *See West Linn Corporate Park, L.L.C. v. City of W. Linn*, 2010 Ore. LEXIS 726, 48-54 (2010) (relying heavily upon the Ninth Circuit's decision in *McClung*). As such, this Court should grant certiorari to restore a proper understanding of the Takings Clause's requirements in the permitting context, as clearly articulated in *Nollan* and *Dolan*.

Secondly, the decisions limiting *Nollan* and *Dolan's* application conflict with the larger body of the Supreme Court's takings jurisprudence, which holds that the takings inquiry looks to the nature of the burden imposed upon the landowner without regard to which governmental actor is imposing the burden. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (The Takings Clause is meant to bar "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Although the constitutional right at issue would be equally burdened whether an exaction is imposed adjudicatively or legislatively, the Ninth Circuit Court's decision in this case suggests that the question of who imposes the burden should

somehow be relevant to the question of whether that burden amounts to a taking. This rationale squarely contradicts *Lingle*, 544 U.S. 528.

Lingle rejected the substantial advancement test, which had previously been used to strike down regulations under the Taking Clause for failure to advance any legitimate purpose. *Id.* at 542. The test was repudiated because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights." *Id.* (emphasis omitted). In doing so, *Lingle* made clear that questions as to the efficacy of a regulation, or the manner by which it is imposed, are necessarily distinct from the takings inquiry. *Id.* at 543 ("A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation."). As such, the takings inquiry focuses only "upon the severity of the burden that government imposes upon private property rights." *Id.* at 539.

Yet the Ninth Circuit's decision to carve out an exception to *Nollan* and *Dolan* shifts the takings inquiry away from the severity of the burden imposed, and focuses instead upon how it has been imposed. Under this formulation, the same burdensome exaction may be upheld if imposed legislatively, but struck down as a taking if imposed adjudicatively. This is precisely the result that *Lingle* pronounces to be incongruent with the Takings Clause. *Id.* at 543. *Lingle* provides that, if two landowners are identically burdened by regulatory acts, "[i]t would make little sense to say that the second owner had suffered a taking while the first has not." *Id.*

Lingle's pronouncement that identical regulatory burdens should be treated equally under the Takings Clause is no less true in the exactions context, though the decision in this case suggests otherwise. As with the other takings tests, *Nollan* and *Dolan* focus upon the severity of the burden imposed. *Id.* at 547 ("*Nollan* and *Dolan* both involved dedications of property *so onerous* that, outside the exactions context, they would be deemed *per se* physical takings.") (emphasis added). *Lingle* recognized that the *Nollan* and *Dolan* exactions amounted to takings because they were functionally equivalent to physical invasions; however, where government physically invades a property, it effects a taking whether the Legislature authorizes the invasion or not. Therefore, if the exactions in *Nollan* and *Dolan* are indeed functionally equivalent to physical invasions, the fact that the Legislature has authorized the imposed conditions is impertinent to the analysis.

Nonetheless, courts are increasingly limiting *Nollan* & *Dolan*'s applicability under the same rationale that the Ninth Circuit employed in this case. In shifting the takings inquiry away from the question of how burdensome the government action is, these courts have opened the door for government to systematically impose exactions that would otherwise be deemed repugnant to the Constitution. As such, this limitation on *Nollan* and *Dolan* operates as an exception, which may effectively swallow the rule.

CONCLUSION

The Ninth Circuit Court has drawn a roadmap for local governments imposing conditions on development: so long as local governments adopt legislation to impose conditions in the form of fees or allowing an option to pay an in-lieu fee, *Nollan* and *Dolan* do not apply. Thus, the vast majority of development conditions are free from meaningful constitutional scrutiny, and property owners are deprived of important constitutional liberties. In this regard, the decision below conforms to a disturbing trend in the lower courts to excuse governments from their constitutional obligation to ensure that development conditions are sufficiently related to mitigate the harm created by new development. *See Armstrong*, 364 U.S. at 49 (Government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Because this decision and this trend cannot be reconciled with the decisions of other courts or of this Court, it is incumbent upon this Court to resolve the issue.

The Petition for Writ of Certiorari should be granted.

DATED: December, 2010.

Respectfully submitted,

MERIEM L. HUBBARD
Counsel of Record
PAUL J. BEARD II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mlh@pacificlegal.org

Counsel for Petitioner

TABLE OF CONTENTS

A. Memorandum (9th Cir. July 22, 2010) A-1

B. Order Granting Defendants' Motions to Dismiss (N.D. Cal. Nov. 19, 2008) B-1

C. Judgment (N.D. Cal. Dec. 10, 2008) C-1

D. Order Denying Rehearing En Banc (9th Cir. Aug. 30, 2010) D-1

E. City of Cotati Municipal Code— Title 17—Land Use Code E-1

Case: 09-15005
07/22/2010
ID: 7413931
DktEntry: 36-1

FILED July 22, 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MEAD,

Plaintiff-Appellant,

v.

CITY OF COTATI, a municipal corporation; PLANNING COMMISSION OF THE CITY OF COTATI; UNITED STATES FISH AND WILDLIFE SERVICE; DONALD KOCH, in his official capacity as Director of the California Department of Fish and Game; CALIFORNIA DEPARTMENT OF FISH AND GAME,

Defendants-Appellees.

No. 09-15005

D.C. No. 4:08-cv-03585-CW

MEMORANDUM*

Appendix A–2

Appeal from the United States District Court
for the Northern District of California
Claudia A. Wilken, District Judge, Presiding

Argued and Submitted February 10, 2010
San Francisco, California

Before: GOODWIN, BERZON and IKUTA, Circuit Judges.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Michael Mead, a developer, appeals the district court's dismissal, on ripeness grounds, of his takings claims against the City of Cotati ("the City"), the U.S. Fish & Wildlife Service ("the Service"), and the California Department of Fish & Game ("the Department"). We affirm.

The Supreme Court has established a two-part ripeness test for Fifth Amendment regulatory takings claims: (1) "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). (2) "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

Mead first objects to the City's requirement that he mitigate the impact of his proposed development on the endangered California Tiger Salamander, in accordance with the Interim Mitigation Guidelines issued by the Service and the Department. As to this requirement Mead has not met the first prong of the *Williamson County* test. As an alternative to complying with the mitigation requirements, Mead may hire a licensed biologist to survey his property, following Service and Department survey guidance. If the survey indicates that no salamanders are present on the site, then the Service will issue a "no effect" letter, and the mitigation requirements will be lifted. Although Mead did hire a consultant to determine the

distance of his property from salamander breeding pools, he has not submitted a properly performed survey tot he Service, and the Service has thus declined to issue a "no effect" letter. Mead does not argue that the cost of performing a proper survey would amount to a taking. Because Mead has not received a final determination from the Service as to whether the salamander mitigation requirements apply to his development project, he has not met the first prong of the *Williamson County* test, and his takings claim is therefore not ripe. *Cf. Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997) (holding a takings claim ripe where the relevant agency had "finally determined" that the petitioner's land lay entirely within an environmentally sensitive area in which development was not allowed).

Second, Mead contests the application of the City's affordable housing requirements to his project. "[A]ssum[ing] without deciding that the takings claim is ripe," *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), we reject Mead's claim on the merits.

Mead has several options for complying with the affordable housing requirement, one of which is to pay an in-lieu fee. *See*, City of Cotati Municipal Code § 17.31.050. A generally applicable development fee is not an adjudicative land-use exaction subject to the "essential nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See McClung*, 548 F.3d at 1225. Instead, the proper framework for analyzing whether such a fee constitutes a taking is the fact-specific inquiry developed by the Supreme Court in *Penn Central*

Transportation Co. v. New York City, 438 U.S. 104 (1978). *See McClung*, 548 F.3d at 1225. Mead has not alleged facts that would satisfy the *Penn Central* test; on the contrary, he insists that his claim is not a *Penn Central* claim but a *Nollan/Dolan* claim. Mead has therefore failed to state a claim on which relief can be granted.

III.

The judgment of the district court is AFFIRMED.

Case 4:08-cv-03585-CW
Document 43
Filed 11/19/2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

MICHAEL MEAD, an individual,

Plaintiff,

v.

CITY OF COTATI, a municipal corporation; PLANNING COMMISSION OF THE CITY OF COTATI; UNITED STATES FISH AND WILDLIFE SERVICE; DONALD KOCH, in his official capacity as Director of the California Department of Fish and Game; and Does 1-10, inclusive,

Defendants.

/

No. C 08-3585 CW

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Michael Mead alleges, among other things, that his property was taken from him without just compensation, in violation of the Fifth Amendment to the United States Constitution. Defendant U.S. Fish and Wildlife Service (FWS) now moves to dismiss

the claim against it. Defendants City of Cotati and Planning Commission of the City of Cotati (the City Defendants) move separately to dismiss the claims against them. The matter was heard on November 6, 2008. Having considered oral argument and all of the papers submitted by the parties, the Court grants Defendants' motions.

BACKGROUND

The following facts are alleged in the complaint or can be determined by reference to documents attached to the complaint. Plaintiff owns 1.6 acres of vacant land in contiguous lots located in Cotati, California. In September, 2006, he applied to the Cotati Planning Commission for a permit to build four duplexes on 0.9 acres of his property. While his application was pending, Plaintiff became aware of two conditions that the Commission intended to impose on his permit: compliance with the City's affordable housing plan and mitigation of the impact of his proposed development on the California tiger salamander, an endangered species.

The affordable housing plan provides that each residential development "shall be designed and constructed to provide at least 20 percent of the total units as inclusionary units restricted for occupancy by moderate-, low- or very low-income households." Compl. Ex. A at § 17.31-020(A). Alternatively, a developer may propose an alternative means of compliance, either by: 1) constructing inclusionary units off-site; 2) dedicating to the City land that is suitable for the construction of inclusionary units; or 3) combining on-site construction, off-site construction, in-lieu fees and land dedication. A developer seeking

to construct nine or fewer units can, instead of meeting these requirements, pay an in-lieu fee to the City.

The tiger salamander mitigation requirement resulted from the City's enforcement of interim mitigation guidelines developed by the FWS and the California Department of Fish and Game (DFG) pursuant to the Endangered Species Act. These guidelines require that, if a development project will adversely affect a known tiger salamander breeding site, a certain amount of land, depending on the project's distance from the breeding site, must be dedicated to salamander conservation. Plaintiff hired a consulting firm to perform a biological assessment of his property. The firm concluded that, because the property is between 2,200 feet and 1.3 miles from a known tiger salamander breeding site, Plaintiff is required to devote one acre of land to habitat conservation for each acre of the breeding site that is adversely affected by his development. Plaintiff submitted the consultant's report to the FWS and the DFG for review and confirmation, but neither agency has provided "any guidance or direction regarding mitigation." Compl. § 17.

In a letter dated August 17, 2007, Plaintiff asked the Commission to waive the tiger salamander mitigation requirement when considering his permit application, claiming that the requirement effects an unconstitutional taking of his property. In a letter dated January 23, 2008, Plaintiff requested a total waiver of both the affordable housing and the tiger salamander mitigation requirements, claiming that they were both unconstitutional takings. On January 28, 2008, the Commission passed a resolution approving Plaintiff's permit application, but subjecting

his project to both conditions. The resolution contains a paragraph that states:

> The Conditions set forth herein include certain fees, dedication requirements, reservation requirements, and other exactions . . . . The applicant is . . . notified that the 90-day approval period in which the applicant may protest these fees, dedications, reservations, and other exactions, pursuant to Government Code Section 66020(1) has begun. If the applicant fails to file protest within this 90-day period complying with all of the requirements of Section 66020, the applicant will be legally barred from later challenging such exactions.

Compl. Ex. F at p. 11, ¶ 52.

In a letter to the Commission dated April 1, 2008, Plaintiff protested the affordable housing and tiger salamander mitigation conditions, arguing that each represents an unlawful taking. The City rejected Plaintiff's protest in a June 6, 2008 letter. In the letter, the City noted that, pursuant to § 17.84.020 of the Cotati Municipal Code, a decision of the Planning Commission may be appealed to the city council within ten days of the date of the decision. It was apparently the City's view that the conditions were not among the "certain fees, dedication requirements, reservation requirements, and other exactions" described in the paragraph above. Accordingly, the City cited Plaintiff's failure to file an appeal to the city council within ten days as one of several grounds for its rejection.

Plaintiff filed this lawsuit on July 25, 2008. He charges all Defendants with unconstitutionally taking

his property without just compensation by imposing the tiger salamander mitigation condition on his development project. He also charges the City Defendants with unconstitutionally taking his property without just compensation by imposing the affordable housing condition on his development project. He further asserts that, by imposing the affordable housing condition, the City Defendants have violated his due process and equal protection rights under the Fourteenth Amendment. Finally, he maintains that the City Defendants have violated the California Mitigation Fee Act.

LEGAL STANDARD

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Federal subject matter jurisdiction must exist at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 595 F.2d 730, 733 (9th

Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

II. Motion to Dismiss for Failure to State a Claim

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See Bell Atl. Corp. v. Twombly, ____ U.S. ____, 127 S. Ct. 1955, 1964 (2007).

In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without

contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. Id. at 296-97.

DISCUSSION

I. The FWS's Motion

The FWS argues that Plaintiff may not proceed with his takings claim against it because the claim is not ripe for review, and thus is not a justiciable case or controversy over which the Court has subject matter jurisdiction pursuant to Article III of the Constitution.

The Fifth Amendment's takings clause provides, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The FWS's argument begins with the premise that the takings clause does not prohibit the government from taking private property, but rather places a condition on such a taking: that the government pay just compensation. See First English Evangelical Luthern Church v. Los Angeles County, 482 U.S. 304, 314 (1987). "In other words, [the takings clause] is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37, (2005) (emphasis in original). Thus, the FWS is not prohibited from taking Plaintiff's property, provided it pays just compensation for it.

The Tucker Act, 28 U.S.C. § 1491, provides that the United States Court of Federal Claims has

exclusive jurisdiction to hear any claim against the United States seeking damages in excess of $10,000 based on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. See 28 U.S.C. § 1491(a)(1); Christopher Vill, L.P. v. United States, 360 F.3d 1319, 1332-33 (Fed. Cir. 2004). Claims for damages not exceeding $10,000 may be brought in either the Court of Federal Claims or in a United States District Court. See 28 U.S.C. § 1346; Christopher Vill., 360 F.3d at 1332. If a plaintiff alleges a taking in violation of the Fifth Amendment, "the claim in 'founded upon the Constitution' and within the jurisdiction of the Claims Court to hear and determine" pursuant to the Tucker Act. Preseault v. ICC, 494 U.S. 1, 12 (1990).

Because a "property owner has no claim against the Government for a taking" if the government "has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation," takings claims against the federal government "are premature until the property owner has availed itself of the process provided by the Tucker Act." Id. at 11.

Plaintiff points out that he does not seek compensation, but rather seeks a declaration that the affordable housing and tiger salamander mitigation conditions are unconstitutional takings, and an injunction prohibiting Defendants from enforcing them. However, "[t]he requirement that a case or controversy exist under the Declaratory Judgment Act is identical to Article III's constitutional case or controversy requirement. If a case is not ripe for review, then there is no case or controversy, and the court lacks subject-matter jurisdiction." Principal Life

Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). Plaintiff's claim for declaratory judgment is not ripe for review because a taking is not unconstitutional unless it is uncompensated, and he has not yet sought compensation.[1] The fact that he seeks a declaratory judgment and equitable relief does not alter this analysis, because the Court cannot declare that an unconstitutional taking has occurred—let alone order injunctive relief—until it can determine that Plaintiff was not given just compensation for the taking.

Plaintiff's argument was directly addressed in Bay View, Inc. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997). In that case, the Ninth Circuit considered whether it could declare that a statute violated the takings clause, even though the Tucker Act provided an avenue for obtaining compensation for those whose property had been taken by operation of the statute. The court concluded that it could not do so:

> [A]ppellants clearly are entitled to bring a Tucker Act claim because Congress did not explicitly preclude such suits when it enacted [the statute that resulted in the alleged taking]. Thus, appellants' takings claim is premature until they have availed themselves of the process provided by the Tucker Act. Because appellants can sue the United States in the Court of Federal Claims, the [statute] is not an uncompensated taking. We

---

[1] The FWS also argues that Plaintiff's claim against it is not ripe in an additional sense: because the agency has not yet reached a final decision regarding application of the mitigation guidelines to Plaintiff's proposed use of his property. The Court need not reach this argument because it finds that it lacks jurisdiction over Plaintiff's claim regardless.

> therefore have no basis for holding [it] invalid as appellants suggest.

Id. at 1285 (citations and internal quotation marks omitted).

The Ninth Circuit considered and rejected the argument that a court's power to adjudicate a takings claim depends on the type of relief the plaintiff seeks:

> [Many courts have viewed the Tucker Act as a jurisdictional hurdle against the payment of damages but not as an impediment to equitable relief. This, of course, it totally wrong. Because a compensation remedy is available, any taking that may have occurred simply cannot violate the takings clause. We have no authority to decide the hypothetical question whether the [statute] would amount to an unconstitutional taking were it uncompensated.

Id. at 1286 (citations omitted). In reaching this conclusion, the court acknowledged that Supreme Court precedent on the matter is confusing and inconsistent. In particular, it noted that Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 71 n. 15 (1978), "suggest[s] that the Tucker Act does not preclude district courts from granting equitable relief in the form of declaratory judgments in takings cases against the United States." Bay View, 105 F.3d at 1286 n.6. But in the subsequent case of Ruckelshaus v. Monsanto, Co., 467 U.S. 986 (1984), the Supreme Court held, "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign

subsequent to the taking." Id. at 1016. After reviewing the applicable precedent, the Bay View court affirmed that the rule in the Ninth Circuit is that "neither injunctive nor declaratory relief is available for a takings claim against the United States." Id. (citing Clouser v. Espy, 42 F.3d 1522, 1539-40 (9th Cir. 1994), cert. denied, 515 U.S. 1141 (1995)). In its view, declaring that an act of the government is an uncompensated taking is a logical impossibility until the property owner has attempted to obtain compensation.

Plaintiff does not specifically address Bay View in its opposition to the FWS's motion. At the hearing, Plaintiff argued that the Ninth Circuit's statement about injunctive and declaratory relief is dicta. The Court disagrees with this characterization. Bay View is explicit in holding that a taking is unconstitutional only if it is not compensated. Granting injunctive or declaratory relief before a plaintiff has sought and been denied compensation would contradict this holding.

Nor has Plaintiff cited any subsequent case that could be interpreted as overruling Bay View. The closest contender is Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). In that case, Justice O'Connor, writing for a four-justice plurality, discussed the interplay between the availability of compensation and the appropriateness of declaratory or equitable relief:

> In this case, [ ] Eastern does not seek compensation from the Government. Instead, Eastern requests a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against the Commissioner's enforcement of the Act as to

Eastern. Such equitable relief is arguably not within the jurisdiction of the Court of Federal Claims under the Tucker Act.

Some Courts of Appeals have accepted the view that the Tucker Act does not apply to suits seeking only equitable relief, while others have concluded that a claim for equitable relief under the Takings Clause is hypothetical, and therefore not within the district courts' jurisdiction, until compensation has been sought and refused in the Court of Federal Claims, see Bay View, 105 F.3d at 1286.

On the one hand, this Court's precedent can be read to support the latter conclusion that regardless of the nature of relief sought, the availability of a Tucker Act remedy renders premature any takings claim in federal district court. See Preseault, 494 U.S. at 11; see also Monsanto, 467 U.S. at 1016. On the other hand, in a case such as this one, it cannot be said that monetary relief against the Government is an available remedy. The payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund. Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for every dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation. Accordingly, the presumption of Tucker Act availability must be reversed where the challenged statute,

rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government. In that situation, a claim for compensation would entail an utterly pointless set of activities. Instead, as we explained in Duke Power, the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." 438 U.S. at 71 n.15.

Moreover, in situations analogous to this case, we have assumed the lack of a compensatory remedy and have granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act. Without addressing the basis of this Court's jurisdiction, we have also upheld similar statutory schemes against Takings Clause challenges. While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper in previous cases. Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.

Id. at 520-22 (some citations and internal quotation marks omitted; remaining citations reformatted).

This passage represents the opinion of four justices only, and thus is not binding on the lower courts. See United States v. Rodriquez-Preciado, 399 F.3d 1118, 1139-41 (9th Cir. 2005). Justice Kennedy, concurring in the judgment, did not reach the issue of whether declaratory relief is available on a claim brought under the takings clause. In his view, because the Coal Act did not affect a "specific property right or interest," but simply required the payment of money, it did not fit within the rubric of the takings clause at all. Id. at 540. The four dissenting justices shared this view. Id. at 554-56. Moreover, it is clear that Justice O'Connor's conclusion depended on "the nature of the taking alleged in [that] case"—specifically, the fact that monetary relief against the government was not an available remedy under the circumstances.[2] Here, in contrast, any taking of Plaintiff's property could be compensated by a monetary payment, and there is no dispute that Plaintiff could bring a claim for such compensation under the Tucker Act. Thus, the rationale behind the plurality opinion in Eastern Enterprises does not apply to this case.

For these reasons, the Court concludes that it lacks jurisdiction to adjudicate Plaintiff's takings claim against the United States. Plaintiff's claim will not be ripe until he has first sought compensation under the Tucker Act.

---

[2] Duke Power, on which Plaintiff also relies—and which was considered by the Ninth Circuit in Bay View—similarly addresses the availability of declaratory relief only where the prospective damage wrought by the taking is "potentially uncompensable." 438 U.S. at 71 n.15.

II. The City Defendants' Motion

A. Takings Claim

Like the FWS, the City Defendants argue that Plaintiff's takings claim against them is not ripe for review. In order to determine whether a takings claim against a defendant other than the United States is ripe for adjudication in federal court, the court performs a two-pronged inquiry: "The plaintiff must have obtained a final decision from the governmental authority charged with implementing the regulations and must have pursued compensation through state remedies unless doing so would be futile." Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 655 (9th Cir. 2003) (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).[3]

In Williamson County, the Supreme Court addressed a takings claim brought against a planning commission that had denied the plaintiff approval of its proposed development project. After the denial, the plaintiff "did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning

---

[3] The "final decision" requirement does not apply to claims challenging an ordinance as a taking on its face because, by definition, such claims "derive from the ordinance's enactment, not any implementing action on the part of governmental authorities." Ventura Mobilehome Cmtys. Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1052 (9th Cir. 2004). It is not clear whether Plaintiff intends to assert a facial or an as-applied challenge to the affordable housing and tiger salamander mitigation requirements. In any event, because the Court concludes that the "final decision" requirement has been met here, the facial/as-applied distinction is not material.

ordinance and subdivision regulations." Williamson County, 473 U.S. at 188. The Court held that, because the plaintiff had "not yet obtained a final decision regarding how it will be allowed to develop its property," id. at 191, the government's action was not yet ripe for review, id. at 194.

Here, the Planning Commission approved Plaintiff's permit with the challenged conditions on January 28, 2008. The City Defendants note that, although the Cotati Municipal Code provides that a Planning Commission's decision must be appealed to the city council within ten days of the date of the decision, Plaintiff did not do so, but instead protested the conditions on his permit in a letter dated April 1, 2008. The City Defendants argue that, because Plaintiff did not appeal the January 28 decision to the city council, the decision was not final and his takings claim must be dismissed.[4]

It is notable that the City Defendants assert that Plaintiff gave up his right to challenge the Commission's decision by not appealing it within ten days. Thus, even according to the City Defendants, there are no remaining avenues that Plaintiff may pursue at the administrative level that could result in the conditions being removed from his permit. This distinguishes the present case from Williamson County. The City's decision is "final" because Plaintiff has been told how he will be allowed to develop his

---

[4] Plaintiff argues that, pursuant to the California Mitigation Fee Act, he had ninety days to protest the conditions. The Court need not determine the validity of this argument because it concludes that Plaintiff has obtained a final decision on his permit application.

property. The decision is therefore ripe for judicial review.

In arguing that Plaintiff's takings claim should be dismissed because he did not appeal the Planning Commission's decision to the city council, even though such an appeal is admittedly unavailable at this time, the City Defendants essentially ask the Court to impose a requirement that Plaintiff exhaust administrative remedies prior to bringing this suit. "The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable." Id. at 192. Neither Williamson County nor any other binding case cited by the City Defendants imposes an exhaustion requirement similar to the one they advocate. Williamson County simply requires that an individual in Plaintiff's position wait to bring a takings claim until the governmental entity charged with implementing the legal requirements at issue has reached a final decision regarding the application of the requirements to the property. See id. at 186.

The question of whether Plaintiff has satisfied the second requirement of the ripeness test—that he have sought compensation through state remedies—is a different matter. This prong is founded on the same principle that requires Plaintiff to seek compensation under the Tucker Act prior to bringing his claim against the FWS. As the Supreme Court stated in Williamson County:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just

> compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the talking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking. Thus, . . . if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

473 U.S. at 194-95 (citations and internal quotation marks omitted). Therefore, a plaintiff "cannot bring a section 1983 action in federal court until the state denies just compensation." Levald, Inc., v. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993); see also Ventura Mobilehome, 371 F.3d at 1053 (affirming dismissal for lack of jurisdiction where a takings claim was not ripe because the plaintiff had not filed suit for damages in state court).

Plaintiff does not allege that he sought and was denied compensation in state court, nor has he shown that doing so would be futile. Rather, he argues that the requirement of seeking compensation before filing a takings claim does not apply to claims seeking equitable relief. But, based on the rationale in Williamson County and as discussed above with respect to the FWS's motion, equitable relief is not available on Plaintiff's takings claim because the Fifth

Amendment would not prevent the City Defendants from taking Plaintiff's property if they were to provide just compensation for it. Plaintiff has not cited any binding authority holding that a plaintiff may avoid the requirement of seeking compensation through state remedies by seeking equitable relief in a federal action. To the contrary, even though Bay View addresses takings claims that seek equitable relief against the United States, its rational applies with equal force to takings claims against state or local governments where an avenue for obtaining compensation is available. In support of his position, Plaintiff relies primarily on the dicta of Duke Power, discussed above, suggesting that the Tucker Act does not preclude district courts from issuing a declaratory judgment in a takings case before potentially uncompensable damages are sustained. But again, the Ninth Circuit has found this passage from Duke Power to be inconsistent with subsequent Supreme Court authority and has not treated it as binding, at least with respect to claims where an avenue for obtaining compensation is available. See Bay View, 105 F.3d at 1286 n.6.

Plaintiff also cites San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005), in which the Supreme Court noted that the petitioners "were never required to ripen the heart of their complaint—the claim that the Hotel Conversion Ordinance was facially invalid because it failed to substantially advance a legitimate state interest—in state court." Id. at 345-46. However, this sentence refers to what was formerly recognized as an exception to the second ripeness requirement: A plaintiff was not required to seek compensation prior to bringing a takings claim under a theory that the government's action was an unconstitutional exercise of

governmental power because it did not substantially advance a legitimate governmental interest. See Ventura Mobilehome, 371 F.3d at 1053-54. This was because such a claim "does not depend on the extent to which the [plaintiff] was compensated," but rather is based on the assertion that the government lacked constitutional authority to effect the taking, "regardless of any compensation that might be offered." Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959, 966 (9th Cir. 2003). However, in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), the Supreme Court clarified that no takings claim could be based on the failure of a statute or regulatory scheme substantially to advance a legitimate governmental interest, and that the appropriate vehicle to challenge land use regulations as arbitrary and irrational is a substantive due process claim.[5] Id. at 540; see also Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1024-26 (9th Cir. 2007). Because the exception identified in San Remo Hotel applies to a type of claim that Plaintiff does not assert[6]—and, in fact, one that no longer exists—Plaintiff may not rely on the exception.

The Court concludes that Plaintiff's takings claim against the City Defendants is not ripe for review

---

[5] As discussed below, Plaintiff does assert a substantive due process claim based on the failure of the affordable housing plan substantially to advance a legitimate state interest. The City Defendants do not move to dismiss that claim on the basis that Plaintiff has not sought compensation through state remedies.

[6] A takings claim may still be asserted for the taking of one's property by the government for private, rather than public, use. See Action Apartment Ass'n, 509 F.3d at 1023-24.

because he has not attempted to seek compensation through state remedies.

B. Substantive Due Process Claim

As noted above, the "arbitrary and irrational deprivation of real property" may form the basis of a substantive due process claim. Action Apartment Ass'n, 509 F.3d at 1025. As a preliminary matter, contrary to Plaintiff's assertion, the Supreme Court in Lingle did not hold that a "government action or law affecting rights in property that fails to substantially advance a legitimate state interest violates the Due Process Clause." Pl.'s Opp. at 17. This formula describes the standard for the type of takings claim that many courts believed existed before the Lingle decision was issued. In fact, the Supreme Court in Lingle specifically disapproved of the "substantially advance" language because it "can be read to demand heightened means-ends review of virtually any regulation of private property." Lingle, 544 U.S. at 544. Such a review "would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited." Id. The Supreme Court has "long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation," id. at 545, because "the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation," Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978). Thus, instead of proceeding under the "substantially advances" standard Plaintiff proposes, he must instead show that the affordable housing ordinance is not rationally related to any legitimate governmental objective. See Lingle, 544 U.S. at 542; Crown Point

Development, Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007). This is an extremely deferential standard of review. See Equity Lifestyle Props., Inc. v. County of San Luis Obispo, 505 F.3d 860, 871 (9th Cir. 2007).

The City's affordable housing ordinance states that its purpose is to "[e]ncourage the development and availability of housing affordable to a broad range of households with varying income levels within the City"; to "[o]ffset the demand on housing created by new development, and mitigate environmental and other impacts that accompany new development by protecting the economic diversity of the City's housing stock, reducing traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in the region"; and to "[i]mplement the policies of the Housing Element of the General Plan." Compl. Ex. A at § 17.31.010. There is no serious question that these are legitimate governmental objectives. See Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1236 (9th Cir. 1994) (noting that "preserving the agricultural heritage of the City, providing for a range of housing types and densities, preserving the 'small town' character of the City, and limiting development within the City to levels consistent with available resources" were all legitimate governmental objectives); Kamaole Pointe Dev. LP v. County of Maui, ____ F. Supp. 2d ____, 2008 WL 2622819, at *23 (D. Haw.) ("[T]he Ordinance addresses a clearly legitimate governmental objective—namely, to provide affordable housing to Maui's workforce in a climate where such housing is increasingly scarce."). Plaintiff's assertion that "[f]orcing one small group of individuals to subsidize the housing of another small group of individuals is not

a legitimate government interest," Compl. ¶ 48, conflates the City's objectives with the means of achieving those objectives. Its primary objective—an increase in the amount of affordable housing—cannot be said to have to have no relationship to "the public health, safety, morals, or general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

As for the means employed by the City, it was not clearly irrational or arbitrary for the City to determine that a combination of set-asides, new construction, land dedication, and payment of in-lieu fees would result in the creation of more housing accessible to low- and moderate-income residents. The affordable housing plan, as described in the complaint, therefore does not violate Plaintiff's substantive due process rights.

Plaintiff argues that a finding that the City's affordable housing plan is not arbitrary and irrational would be premature, and that such a finding is not possible if the Court accepts the allegations in the complaint as true. However, the Court need only accept the material facts in the complaint as true for the purposes of this motion. It need not accept as fact what are actually arguments, legal conclusions or Plaintiff's personal views on economic matters. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). The complaint's description of the challenged aspects of the affordable housing plan is sufficient to enable the Court to determine, without a fuller record, that the plan is not clearly irrational. The Court need not wait to consider expert testimony on the economic disincentives that Plaintiff asserts the plan creates for new housing development, because the Court need not determine whether the plan is the

wisest means of increasing the amount of affordable housing in the City. Indeed, such a determination would require the Court to substitute its judgment for the city council's, and is thus beyond the permissible scope of its review. See Exxon, 437 U.S. at 124.

C. Equal Protection Claim

The Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because Plaintiff does not allege that he is a member of a protected class, he can succeed on his equal protection claim only by demonstrating that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). "Disparate government treatment will survive rational basis scrutiny 'as long as it bears a rational relation to a legitimate state interest.'" Id. (quoting Patel v. Penman, 103 F.3d 868, 875 (9th Cir. 1996)).

The allegations in the complaint do not establish that Plaintiff has been treated differently from similarly situated individuals, let alone in an irrational manner. Plaintiff does not allege, for example, that he has been treated differently than other developers with similar project proposals. His claim appears to be based on his view that developers are being forced to subsidize housing for low- and moderate-income individuals, whereas other taxpayers are not. But individuals pursuing development projects are not situated similarly to other taxpayers, in that they are in a unique position to create affordable housing. And,

as explained above, requiring this group to set aside twenty percent of new housing for low- and moderate-income individuals is rationally related to the City's interest in increasing the amount of affordable housing within its limits.

Plaintiff's situation is not comparable to that of the plaintiff in Village of Willowbrook, the only case he cites in support of his position. There, the complaint was "construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting [the plaintiff's] property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners." 528 U.S. at 565. Plaintiff simply does not allege that he was singled out for treatment that differed in any way from the treatment of those who were situated similarly to him. Accordingly, he has not stated a cognizable equal protection claim.

D. Mitigation Fee Act Claim

The Mitigation Fee Act, California Government Code §§ 66000 et seq., was enacted "in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects." Ehrlich v. City of Culver City, 12 Cal. 4th 854, 864 (1996). In the complaint, Plaintiff contends that the affordable housing and tiger salamander mitigation requirements violate § 66001 of the Act. This section provides in relevant part:

> (a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:
>
> . . .

> (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.
>
> (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.
>
> (b) In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

Cal. Gov't Code § 66001.[7] The Act defines a "fee" as:

> a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the

---

[7] Plaintiff correctly notes that, in Ehrlich, the California Supreme Court determined that the "reasonable relationship" language should be viewed through the lens of the Fifth Amendment takings jurisprudence. By interpreting the Mitigation Fee Act as requiring that development fees satisfy the takings clause, "a development fee imposed pursuant to the act . . . will not be subject to challenge on constitutional grounds." Ehrlich, 12 Cal. 4th at 867.

> cost of public facilities related to the development project.

Id. § 66000(b).

Although § 66001 on its face simply imposes procedural requirements on local agencies—i.e., that they make certain determinations—California courts appear to permit claims against local agencies for violations of § 66001, not just on the basis that the agency failed to make the required determinations, but also on the basis that the fee in question is not reasonably related to the cost of the public facilities for which it is charged. See, e.g., Ehrlich, 12 Cal. 4th at 864-65.

Plaintiff cannot base a Mitigation Fee Act claim on § 66001 because he does not challenge the City's imposition of a "fee." First, the tiger salamander mitigation and affordable housing requirements are not "monetary exactions." They do not require that Plaintiff pay the City for the right to develop his land. Rather, they require that he use his land in a particular way. That Plaintiff may, at his election, choose to pay a fee in lieu of satisfying the conditions does not render the conditions themselves fees. Second, even if Plaintiff chose to pay the in-lieu fees, they are not exacted for "the purpose of defraying all or a portion of the cost of public facilities related to the development project." Such payments therefore would not qualify as "fees" under § 66000 and would not be subject to the requirements of § 66001. See Centex Real Estate Corp. v. City of Vallejo, 19 Cal. App. 4th 1358, 1364 (1993) (holding that a property development excise tax was not a "fee" within the meaning of the Mitigation Fee Act because it was "imposed to raise revenue for the City's general fund

and not for the limited purpose of funding public facilities or services related to a new development"); Williams Commc'ns, LLC v. City of Riverside, 114 Cal. App. 4th 642, 658 (2004) ("We agree with the trial court's conclusion that the $750,103 was not a fee within the meaning of this definition because it was not assessed for the purpose of defraying the cost of Williams's project.").

In opposing the City Defendants' motion, Plaintiff apparently concedes that the conditions imposed on his development are not "fees" under the Mitigation Fee Act. Instead, he argues that the conditions are "exactions" that may be challenged under other provisions of the Act, notwithstanding that the complaint cites only § 66001. Specifically, he refers to § 66020, which provides:

> Any party on whom a fee, tax, assessment, dedication, reservation, or other exaction has been imposed, the payment or performance of which is required to obtain governmental approval of a development . . . or development project, may protest the establishment or imposition of the fee, tax, assessment, dedication, reservation, or other exaction as provided in Section 66020.

Cal Gov't Code § 66021(a) (emphasis added). Section 66020, in turn provides:

> (a) Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project . . . by a local agency by meeting both of the following requirements:

> (1) Tendering any required payment in full or providing satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions necessary to meet the requirements of the imposition.
>
> (2) Serving written notice on the governing body of the entity,
>
> > (A) A statement that the required payment is tendered or will be tendered when due, or that any conditions which have been imposed are provided for or satisfied, under protest.
> >
> > (B) A statement informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest.

Id. § 66020(a) (emphasis added). This section continues:

> Any party who files a protest pursuant to subdivision (a) may file an action to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or other exactions imposed on a development project by a local agency within 180 days after the delivery of the notice.

Id. § 66020(d)(2).[8]

---

[8] In his opposition, Plaintiff also cites another section of the Act providing, "When a local agency imposes any fee or exaction as a (continued...)

Even assuming that the challenged conditions are exactions,[9] these provisions of the Mitigation Fee Act simply provide a procedure by which the conditions may be challenged.[10] They do not provide an independent basis for evaluating the lawfulness of the exactions. See Williams, 114 Cal. App. 4th at 658 (interpreting "other exaction" to include "any unlawful charge" and permitting the plaintiff to recover charges

---

[8] (...continued)
condition of approval of a proposed development . . . or development project, those fees or exactions shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed." Cal. Gov't Code § 66005(a). Plaintiff does not explain how this section, which, like § 66001, applies only to fees or monetary exactions imposed to mitigate the cost of providing services or facilities, applies to his claim.

[9] In Fogarty v. City of Chico, 148 Cal. App. 4th 537 (2007), the court found that "exactions" do not include "land use restrictions, which are not any form of payment," but rather encompass conditions which, like the other terms in § 66020, "involve divesting a developer of either money or a possessory interest in the subject property." Id. at 543-44. The conditions imposed on Plaintiff's permit do not divest him of either money or a possessory interest in his land. Rather, they are akin to land use restrictions, and thus are not exactions under Fogarty.

[10] The California Supreme Court has interpreted the language of § 66020 as expressing the legislature's intent "to require all protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to the development project—regardless of the legal underpinnings of the protest—to be channeled through the administrative procedures mandated by the Act. Such claims would encompass not only statutory grounds, but contentions that a given imposition offends the commands of the takings clause of the Fifth Amendment." Ehrlich, 12 Cal. 4th at 866. Although the parties dispute whether Plaintiff has complied with the Act's requirements, the Court need not reach the issue.

in excess of the reasonable cost of providing the services for which the charges were imposed; such excess charges were independently unlawful under Government Code § 50030). The only basis Plaintiff identifies for concluding that the conditions of his permit are unlawful, other than that they violate § 66001, is that they violate the takings clause of the Fifth Amendment; except as discussed above, he has not alleged that the conditions violate a specific provision of the Mitigation Fee Act. But Plaintiff's takings claim is not ripe for review because he has not sought compensation through mechanisms provided by the state. Plaintiff has not cited any authority for the proposition that the Mitigation Fee Act, simply by providing a procedure by which he may challenge an exaction as unlawful, supplies the Court with a basis to adjudicate his unripe takings claim.

For these reasons, Plaintiff has not stated a claim under the Mitigation Fee Act.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are GRANTED.[11] Plaintiff's takings claim against the U.S. Fish and Wildlife Service is dismissed without prejudice to re-filing after he has first sought compensation for the alleged taking under the Tucker Act. Likewise, his takings claim against the City of Cotati and the Planning Commission of the City of Cotati is dismissed without prejudice to re-filing after he has first sought compensation for the alleged taking

---

[11] The Court denies as moot the City Defendants' requests for judicial notice. In ruling on this motion, the Court did not rely on any documents other than those that were attached to the complaint.

by pursuing state remedies. Because the basis for dismissing this claim is equally applicable to the takings claim against Defendant Donald Koch, the claim against Mr. Koch is dismissed as well. See Silverton v. Dept' of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related.") Plaintiff's substantive due process, equal protection and Mitigation Fee Act claims are dismissed without prejudice to filing an amended complaint alleging, if he can truthfully do so, facts sufficient to overcome the deficiencies identified in this order.[12]

Any amended complaint must be filed within ten days of the date of this order. If no amended complaint is filed, the clerk shall enter judgment and close the file.

IT IS SO ORDERD.

Dated: 11/19/08

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

---

[12] The complaint asserts that the Court has supplemental jurisdiction over Plaintiff's Mitigation Fee Act claim pursuant to 28 U.S.C. § 1367(a). If Plaintiff does not seek to amend the claims over which the Court has federal question jurisdiction but chooses to amend his Mitigation Fee Act claim, the Court will decline to exercise supplemental jurisdiction over the claim. See 28 U.S.C. § 1367(c)(3).

Appendix C–1

Case 4:08-cv-03585-CW
Document 45
Filed 12/10/2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

MICHAEL MEAD,

Plaintiff,

v.

CITY OF COTATI, a municipal corporation, PLANNING COMMISSION OF THE CITY OF COTATI, UNITED STATES FISH AND WILDLIFE SERVICE, DONALD KOCH, in his official capacity as Director of the California Department of Fish and Game, DIRECTOR DONALD KOCH, and CALIFORNIA DEPARTMENT OF FISH AND GAME,

Defendants.

No. C 08-3585 CW

JUDGMENT

/

For the reasons set forth in this Court's Order Granting Defendants' Motions to Dismiss,

IT IS ORDERED AND ADJUDGED

That Plaintiff Michael Mead take nothing, that the action be dismissed on the merits, and that Defendants City of Cotati, Planning Commission of the City of Cotati, and United States Fish and Wildlife Service and recover of Plaintiff Michael Mead their costs of action.

Dated at Oakland, California, this 10th day of December, 2008.

RICHARD W. WIEKING
Clerk of the Court

By: /s/ Sheilah Cahill
SHEILAH CAHILL
Deputy Clerk

Case: 09-15005
8/30/10
ID: 7456250
DktEntry: 39

FILED Aug. 30, 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MEAD,	No. 09-15005
Plaintiff-Appellant,	D.C. No. 4:08-cv-03585-CW Northern District of
v.	California, Oakland
CITY OF COTATI, a municipal corporation; PLANNING COMMISSION OF THE CITY OF COTATI; UNITED STATES FISH AND WILDLIFE SERVICE; DONALD KOCH, in his official capacity as Director of the California Department of Fish and Game; CALIFORNIA DEPARTMENT OF FISH AND GAME,	ORDER
Defendants-Appellees.	

_____/

Before: GOODWIN, BERZON and IKUTA, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc.

The petition for rehearing en banc is, therefore, DENIED.

CITY OF COTATI MUNICIPAL CODE— TITLE 17—LAND USE CODE

CHAPTER 17.31—AFFORDABLE HOUSING REQUIREMENTS

Sections:

17.31.010—Purpose

17.31.020—Applicability

17.31.030—Exemptions

17.31.040—Standards for Inclusionary Units

17.31.050—In-Lieu Fees

17.31.060—Alternatives

17.31.070—Compliance Procedures

17.31.080—Eligibility for Occupying Inclusionary Units

17.31.090—Owner-Occupied Units

17.31.100—Rental Units

17.31.110—Adjustments, Waivers

17.31.120—Affordable Housing Trust Fund

17.31.130—Enforcement

17.31.010—Purpose

The purpose of this Chapter is to:

A. Encourage the development and availability of housing affordable to a broad range of households with varying income levels within City as

mandated by Government Code Sections 65580 et seq.;

B. Offset the demand on housing created by new development, and mitigate environmental and other impacts that accompany new development by protecting the economic diversity of the City's housing stock, reducing traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in the region;

C. Implement the policies of the Housing Element of the General Plan.

17.31.020—Applicability

A. **Inclusionary requirement.** Each residential development shall be designed and constructed to provide at least 20 percent of the total units as inclusionary units restricted for occupancy by moderate-, low- or very low-income households. The number in inclusionary units required for a particular project will be determined only once, at the time of Tentative or Parcel Map approval, or, for developments not processing a map, prior to issuance of a Building Permit. If a change in the subdivision design changes the total number of units, the number of inclusionary units required will be recalculated to coincide with the final approved project.

1. **Calculation.** For purposes of calculating the number of affordable units required by this Section, any additional units authorized as a density bonus in compliance with Chapter 17.32 (Density Bonuses) will not be counted in determining the required number of

inclusionary units. In determining the number of whole inclusionary units required, any decimal fraction less than 0.5 shall be rounded down to the nearest whole number, and any decimal fraction of 0.5 or more shall be rounded up to the nearest whole number.

2. **Limitations on occupancy.** At least one-third of the required inclusionary units shall be restricted to occupancy by low-income households. An additional one-third of the inclusionary units shall be restricted to occupancy by very low-income households. To encourage additional development of low- and very low-income housing, the Council may authorize the use of the following equivalents:

   a. Each very low-income unit is equivalent to two units affordable to moderate-income households; and

   b. Each low-income unit is equivalent to 1.5 units affordable to moderate-income households.

B. **Minimum requirements.** The requirements of this Chapter are minimum and maximum requirements, although nothing in this Chapter limits the ability of a person to waive their rights or voluntarily undertake greater obligations than those imposed by this Chapter.

17.31.030—Exemptions

The requirements of this Chapter do not apply to:

A. The reconstruction of a structure that has been destroyed by fire, flood, earthquake or other act of

nature, provided that reconstruction does not increase the number of residential units; or

B. A development that already has more units that qualify as affordable to moderate-, low- and very low-income households than this Chapter requires; or

C. Housing constructed by other government agencies; or

D. A second unit.

17.31.040—Standards for Inclusionary Units

Each inclusionary unit built in compliance with this Chapter shall comply with to the following standards.

A. **Location of inclusionary units.** Except as otherwise provided in this Chapter, inclusionary units shall be dispersed throughout a residential development.

B. **Design.** Inclusionary units shall be comparable in infrastructure (including sewer, water and other utilities), construction quality and exterior design to the market-rate units. Inclusionary units may be smaller in aggregate size and have different interior finishes and features than market-rate units so long as the interior features are durable, of good quality and consistent with contemporary standards for new housing. The number of bedrooms shall be the same as those in the market-rate units, except that if the market-rate units provide more than four bedrooms, the inclusionary units need not provide more than four bedrooms.

C. **Timing of construction.** All inclusionary units shall be constructed and occupied concurrently with or prior to the construction and occupancy of market-rate units or development. In phased developments, inclusionary units may be constructed and occupied in proportion to the number of units in each phase of the residential development, provided that the last inclusionary unit in the project shall be constructed before the last market rate unit.

D. **Duration of affordability requirement.** Inclusionary units produced in compliance with this Chapter shall be legally restricted to occupancy by households of the income levels for which the units were designated, for a minimum of 30 years from the date of first occupancy for rental units, and for a minimum of 30 years from the date of each sale of any affordable unit for owner occupied units. (Additional affordability requirements may apply in compliance with State Redevelopment Law (Health and Safety Code Section 33413(c).)

17.31.050—In-Lieu Fees

A residential development of nine or fewer units may comply with the requirements of this Chapter by paying an in-lieu fee as established by Council resolution, as it may be amended from time to time. The Council may annually review the fee and may, based on the review, adjust the fee. For any annual period during which the Council does not review the fee authorized by this Subsection, fee amounts will be adjusted once by the City Manager based on the Construction Cost index.

17.31.060—Alternatives

A. **Developer proposal.** A developer may propose an alternative means of compliance in an Affordable Housing Plan as provided in Section 17.31.070.B as follows.

1. **Off-site construction.** Units may be constructed off-site if the inclusionary units will be located an area where, based on the availability of affordable housing, the Council finds that the need for such units is greater than the need in the area of the proposed development.

2. **Land dedication.** In lieu of building inclusionary units, a developer may choose to dedicate land to the City suitable for the construction of inclusonary units that the Council reasonably determines to be of equivalent or greater value than is produced by applying the inclusionary obligation.

3. **Combination.** The Council may accept any combination of on-site construction, off-site construction, in-lieu fees and land dedication that at least equal the cost of providing inclusionary units on-site as would otherwise by required by this Chapter. The value of a proposed land dedication shall be determined by an appraiser appointed by the City.

B. **Discretion.** The Council may approve, conditionally approve, or reject any alternative proposed by a developer as part of an Affordable Housing Plan. Any approval or conditional approval shall be based a finding that the purposes of this Chapter would be better served

by implements of the proposed alternatives. In determining whether the purposes of this Chapter would be better served under the proposed alternative, the Council should consider:

1. Whether implementation of an alternative would overly concentrate inclusionary units within any specific area and, if so, must reject the alternative unless the undesirable concentration of inclusionary units is offset by other identified benefits that flow from implementation of the alternative in issue; and

2. The extent to which other factors affect the feasibility of prompt construction of the inclusionary units on the property, such as costs and delays, the need for an appraisal, site design, zoning, infrastructure, clear title, grading and environmental review.

17.31.070—Compliance Procedures

A. **General.** Approval of an inclusionary housing plan and implementation of a City approved inclusionary housing agreement is a condition of any Tentative Map, Parcel Map or Building Permit for any development for which this Chapter applies. This Section does not apply to an exempt project, or to a project where the requirements of the Chapter are satisfied by payment of a fee in compliance with Section 17.31.050 (In-Lieu Fees).

B. **Inclusionary Housing Plan.** No application for a Tentative Map, Parcel Map, or Building Permit to which this Chapter applies shall be deemed complete until an Inclusionary Housing Plan is

submitted with the application. At any time during the review process, the City may require from the developer additional information reasonably necessary to clarify and supplement the application or determine the consistency of the proposed Inclusionary Housing Plan with the requirements of this Chapter. The Inclusionary Housing Plan must include:

1. The location, structure (attached, semi-attached, or detatched), whether for sale or rental, size of the proposed market-rate and inclusionary units, and the basis for calculating the number of inclusionary units;

2. A floor or site plan showing the location of the inclusionary units;

3. The income levels to which each inclusionary unit will be made affordable;

4. For phased development, a phasing plan that provides for the timely development of the number of inclusionary units proportionate to each proposed phase of development as required by Section 17.31.040.C (Standards for Inclusionary Units—Timing of construction).

5. Any alternative means designated in Section 17.31.060.A (Alternatives—Developer proposal) proposed for the development along with information necessary to support the findings required by 17.31.060.B (Alternatives—Discretion) for approval of the alternatives; and

6. Any other information reasonably requested by the City to assist with evaluation of the plan in compliance with the standards of this Chapter.

C. **Inclusionary Housing Agreement.** The Inclusionary Housing Agreement shall use the form provided by the City. The contents of the agreement may vary depending on the manner in which the provisions of this Chapter are satisfied for a particular development. Each Inclusionary Housing Agreement shall include, at minimum, the following:

1. Description of the development, including whether the inclusionary units will be rented or owner-occupied;

2. The number, size and location of very low-, low- or moderate-income units;

3. Provisions and/or documents for resale restrictions, deeds of trust, rights of first refusal or rental restrictions;

4. Provisions for monitoring the ongoing affordability of the units, and the process for qualifying prospective resident Households for income eligibility; and

5. Any additional obligations relevant to the compliance with this Chapter.

D. **Recording of agreement.** Each Inclusionary Housing Agreement shall be recorded against owner-occupied inclusionary units and residential projects containing rental inclusionary units, as applicable. Additional rental or resale restrictions, deeds of trust, rights of first refusal

and/or other documents acceptable to the City shall also be recorded against owner-occupied inclusionary units. In cases where the requirements of this Chapter are satisfied through the development of off-site units, the Inclusionary Housing Agreement shall simultaneously be recorded against the property where the off-site units are to be developed.

17.31.080—Eligibility for Occupying Inclusionary Units

A. **General eligibility.** No household may occupy an inclusionary unit unless the City or its designee has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by an Inclusionary Housing Agreement or resale restriction. If the City or its designee maintains a list or identifies eligible households, initial and subsequent occupants will be selected first from the list of identified households, to the maximum extent possible, in compliance with any rules approved by the City.

B. **Occupancy.** A household who occupies a rental inclusionary unit or purchases an inclusionary unit shall occupy the unit as a principal residence.

17.31.090—Owner-Occupied Units

A. **Initial sales price.** The initial sales price of the inclusionary unit must be set so that the eligible household will pay an affordable ownership cost.

B. **Transfer.** Renewed restrictions will be entered into on each change of ownership, with a 30-year renewal term, upon transfer of an owner-occupied

inclusionary unit prior to the expiration of the 30-year affordability period.

C. **Resale.** The maximum sales price permitted on resale of an inclusionary unit designated for owner-occupancy shall be the lower of:

1. Fair market value; or

2. The seller's lawful purchase price, increased by the lessor of:

   a. The rate of increase of area median income during the seller's ownership; or

   b. The rate at which the consumer price index increased during the seller's ownership.

To the extent authorized in any resale restrictions or operative Inclusionary Housing Agreement, sellers may recover at time of sale the market value of capital improvements made by the seller and the seller's necessary and usual costs of sale, and may authorize an increase in the maximum allowable sales price to achieve such recovery.

D. **Change in title.** The following requirements apply in the event of a change in circumstance, including death, marriage, and divorce, that may occur prior to the expiration of the required affordability period.

1. Upon the death of one of the owners, title in the property may transfer to the surviving joint tenant, tenant in common, or community property holder, without respect to the income-eligibility of the household.

2. Upon the death of a sole owner or all owners, and inheritance of the inclusionary unit by a non-income-eligible inheritee, there will be a one year compassion period between the time when the estate is settled and the time when the property must be sold to an income-eligible household. A non-eligible inheritee may request and the Council may waive this requirement on the basis of hardships specified by the Council. Alternatively, the Council may authorize their continued ownership with the unit rented at an affordable rate to an eligible household.

17.31.100—Rental Units

A. **Eligibility of tenants.** The owner of rental inclusionary units shall be responsible for certifying the income of the tenant to the Director at the time of initial rental, and annually thereafter. This shall be completed by viewing acceptable documentation, including income tax statements or a W-2 for the previous calendar year, and submitting on a form approved by the City, a certification that the tenant qualifies as an income eligible household.

B. **Section of tenants.** The owner of rental inclusionary units shall fill vacant units by either:

1. Selecting income-eligible households themselves as long as the owner complies with the publication requirements in Subsection C.

2. Selecting income-eligible households from the City's Section 8 Housing Choice Voucher Waiting List available from the Department.

C. **Publication of Availability of Units.** Whenever an inclusionary unit becomes available, the Owner shall publish notices of the availability of inclusionary units in newspapers circulated widely in the city, including newspapers that reach minority communities. The notice should briefly explain what inclusionary housing is, state the applicable income requirements, indicate where applications are available, state when the application period opens and closes, and provide a telephone number for question. Applications may require the name, address, and telephone number of the applicant; the number of persons to occupy the household; and any other information relevant to determine whether the applicant is eligible to occupy an inclusionary unit. The owner shall submit proof of publication to the Director.

D. **Notification to City.** Whenever an inclusionary unit becomes available, the owner shall immediately notify the Director in writing.

E. **Subsequent rental to income-eligible tenant.** The owner of rental inclusionary units shall apply the same rental terms and conditions to tenants of inclusionary units as are applied to all other tenants, except as otherwise required to comply with this Chapter (i.e., rent levels, occupancy restrictions and income requirements) and/or government subsidy programs. Discrimination based on subsidies received by the prospective tenant is prohibited.

F. **Changes in tenant income.** If after moving into an inclusionary unit the tenant's income eventually exceeds the income limit for that unit, the tenant may remain in the unit (the "original

unit") as long as his/her income does not exceed 140 percent of the income limit for the original unit. Once the tenant's income exceeds 140 percent of the income limit for the original unit, the following shall apply:

1. If the tenant's income does not exceed the income limits of other inclusionary units in the residential development, the owner may, at the owner's option, allow the tenant to remain in the original unit at the tenant's new applicable affordable housing cost, as long as the next vacant unit is re-designated for the same lower income category applicable to the original unit. If the owner does not want to re-designate the next vacant unit, the tenant shall be given one year's notice to vacate the unit. If during the year, an inclusionary unit becomes available and the tenant meets the income eligibility for that unit, the owner shall provide the tenant with the opportunity to submit an application for that unit.

2. If there are no units designated for a higher income category within the residential development that may be substituted for the original unit, the tenant shall be given one year's notice to vacate the unit. If within that year, another unit in the residential development is vacated, the owner may, at the owner's option, allow the tenant to remain in the original unit and raise the tenant's rent to market rate and designate the newly vacated unit for the original unit at the applicable affordable housing cost. the

newly vacated unit must be comparable in size (i.e. number of bedrooms bathrooms, square footage, etc.) and location (i.e. same floor, same view, etc.) as the original unit.

17.31.110—Adjustments, Waivers

The requirements of this Chapter may be adjusted or waived in extreme cases if the developer demonstrates to the Council by presentation of substantial evidence that applying the requirements of this Chapter would take property in violation of the U.S. or California Constitutions.

A. **Timing.** To receive an adjustment or waiver, the developer must make a showing when applying for a first approval for the residential development, and/or as part of any appeal that the City provides as part of the process for the first approval.

B. **Considerations.** In making a determination on an application to adjust or waive the requirements of this Chapter, the Council may assume each of the following when applicable:

1. That the developer is subject to the inclusionary housing requirement or in-lieu fee;

2. The extent to which the developer will benefit from inclusonary incentives;

3. that the developer will be obligated to provide the most economical inclusionary units feasible in terms of construction, design, location and tenure; and

4. That the developer is likely obtain other housing subsidies where such funds are reasonably available.

C. **Decision and further appeal.** The Council, upon legal advice provided by or at the behest of the City Attorney, will determine the application and issue a written decision.

D. **Modification of plan.** If the Council, upon legal advice provided by or at the behest of the City Attorney, determines that the application of the provisions of this Chapter lacks a reasonable relationship between the impact of a proposed residential project and the requirements of this Chapter, or that applying the requirement of this Chapter would take property in violation of the U.S. or California Constitutions, the Inclusionary Housing Plan shall be modified, adjusted or waived to reduce the obligations under this Chapter to the extent necessary to avoid an unconstitutional result. If the Council determines no violation of the U.S. or California Constitutions would occur through application of this Chapter, the requirements of this Chapter remain applicable.

17.31.120—Affordable Housing Trust Fund

A. **Fund established.** There is hereby established a separate Affordable Housing Trust Fund ("Fund"). This Fund shall receive all fees contributed under Sections 17.31.050 (In-Lieu Fees) and 17.31.060 (Alternatives), and may also receive monies from other sources.

B. **Purpose and limitations.** Monies deposited in the Fund must be used to increase and improve

the supply of housing affordable to moderate-, low-, and very low-income households in the City. Monies may also be used to cover reasonable administrative or related expenses associated with the administration of this Section.

C. **Administration.** The fund shall be administered by the City Manager with the approval of the Council. The City Manager may develop procedures to implement the purposes of the Fund consistent with the requirements of this Chapter and any adopted budget of the City.

D. **Expenditures.** Fund monies shall be used in compliance with the Housing Element, Redevelopment Plan, or subsequent plan adopted by the Council to construct, rehabilitate or subsidize affordable housing or assist other governmental entities, private organizations or individuals to do so. Permissible uses include assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, pre-development loan funds, participation leases or other public-private partnership arrangements. The Fund may be used for the benefit of both rental and owner-occupied housing.

E. **City Manager's annual report.** The City Manager shall report to the Council and Commission on the status of activities undertaken with the Fund in compliance with Government Code Section 66006(b). The report shall include a statement of income, expenses, disbursements and other uses of the Fund. The report should also state the file number and type of inclusionary units constructed or assisted during that year and

the amount of assistance. the report will evaluate the efficiency of this Chapter in mitigating City's shortage of affordable housing and recommend any changes to this Chapter necessary to carry out its purposes, including any adjustments to the number of units to be required.

17.31.130—Enforcement

A. **Penalty for violation.** It shall be a misdemeanor to violate any provision of this Chapter. Without limiting the generality of the foregoing, it shall also be a misdemeanor for any person to sell or rent to another person an affordable unit under this Chapter at a price or rent exceeding the maximum allowed under this Chapter or to sell or rent an affordable unit to a household not qualified under this Chapter. It shall further be a misdemeanor for any person to provide false or materially incomplete information to the City or to a seller or lessor of an inclusionary unit to obtain occupancy of housing for which he or she is not eligible.

B. **Legal action.** The City may institute any appropriate legal actions or proceedings necessary to ensure compliance with this Chapter, including:

1. Actions to revoke, deny or suspend any permit, including a Building Permit, Certificate of Occupancy, or discretionary approval;

2. Actions to recover from any violator of this Chapter civil fines, restitution to prevent unjust enrichment from a violation of this Chapter, and/or enforcement costs, including attorneys fees;

3. Eviction of foreclosure; and

4. Any other appropriate action for injunctive relief or damages. Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any person, owner, household or other party from the requirements of this Chapter.

Article 3—Site Planning, Design, and Operation

June 2005

Pages 3-25 to 3-32

CITY OF COTATI

REVISED
ATTACHMENT A
IN LIEU FEE SCHEDULE

Sales Price Lot & House

Under $75,000	Proposed
$ 75,000 - $ 79,999	$ 150 per unit
$ 80,000 - $ 84,999	$ 240 per unit
$ 85,000 - $ 89,999	$ 425 per unit
$ 90,000 - $ 94,999	$ 600 per unit
$ 95,000 - $ 99,999	$ 850 per unit
$ 100,000 - $ 104,999	$ 1,200 per unit
$ 105,000 - $ 109,999	$ 1,500 per unit
$ 110,000 - $ 114,999	$ 1,800 per unit
$ 115,000 - $ 119,999	$ 2,200 per unit
$ 120,000 - $ 124,999	$ 2,400 per unit
Each incremental $5,000 range	An additional $200.00

Sales Price Projections

$5,000 x 20 = $100,000

$200 x 20 = $4,000

Every $100,000 = $4,000 additional fee

$ 125,000	$ 2,400 per unit
$ 225,000	$ 6,400 per unit
$ 325,000	$ 10,400 per unit
$ 425,000	$ 14,400 per unit
$ 525,000	$ 18,400 per unit
$ 625,000	$ 22,400 per unit
$ 725,000	$ 26,400 per unit
$ 825,000	$ 30,400 per unit

y:planning\housing\in lieu fee schedule

184

No. 10-828

Supreme Court, U.S.
FILED
MAR 17 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL MEAD,

Petitioner,

v.

CITY OF COTATI, a municipal corporation, PLANNING COMMISSION OF THE CITY OF COTATI, UNITED STATES FISH AND WILDLIFE SERVICE, DONALD KOCH, In his official capacity as Director of the California Department of Fish And Game,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION OF CITY OF COTATI AND PLANNING COMMISSION OF THE CITY OF COTATI TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD R. RUDNANSKY
JULIA L. BOND
DAWN A. MCINTOSH
Counsel of Record
MEYERS, NAVE, RIBACK, SILVER & WILSON
333 South Grand Avenue, Suite 1670
Los Angeles, CA 90071
Telephone: (213) 626-2906
Facsimile: (213) 626-0215
E-mail: rrudnansky@meyersnave.com
E-mail: dmcintosh@meyersnave.com

Attorneys for Respondents City of Cotati and Planning Commission of the City of Cotati

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should the takings test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) be expanded beyond the limited context of adjudicative land-use decisions conditioning approval of development on the dedication of property to public use to apply to all generally applicable legislative conditions imposed by local governments?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
I. THE PETITION MISCHARACTERIZES THE HOLDING OF THE NINTH CIRCUIT AND THE ISSUES PRESENTED BY THIS CASE	5
II. PETITIONER GROSSLY OVERSTATES THE NATIONAL SIGNIFICANCE OF THIS CASE	12
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Allard, 444 U.S. 51 (1979) 8

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 10, 12

City of Olympia v. Drebick, 156 Wash.2d 289, 126 P.2d 802 (Wash. 2006), *cert. denied*, 549 U.S. 988 (2006) 13

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... *passim*

Ehrlich v. City of Culver City, 12 Cal.4th 854, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 13

Home Builders Ass'n of Central Arizona v. City of Scottsdale, 187 Ariz. 479, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 11209 14

Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2001) 14

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) ..... *passim*

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 8

McCarthy v. City of Leawood, 257 Kan. 566, 894 P.2d 836 (Kan. 1995) 14

McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2765 (2009) 8, 10, 11

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 8, 9, 11

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 8

Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 345 S.C. 418, 548 S.E.2d 595 (S.C. 2001) 14

Smith v. Town of Mendon, 4 N.Y.3d 1, 822 N.E.2d 1214 (N.Y. 2004) 13

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) 12

Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620 (Tex. 2004) 13, 14

Trimen Development Co. v. King County, 124 Wash.2d 261, 877 P.2d 187 (Wash. 1994) 13

Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) 13

Waters Landing Ltd. Partnership v. Montgomery County, 337 Md. 15, 650 A.2d 712 (Md. 1994) 14

West Linn Corporate Park, L.L.C. v. City of West Linn, 349 Or. 58, 240 P.3d 29 (Or. 2010) 15

Williamson County Regional Planning Com'n v. Hamilton Bank, 473 U.S. 172 (1985) 4

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case involves an ordinance of the City of Cotati, California ("the City" or "Cotati") which requires residential developers in the City to provide 20 percent of their units at an affordable price for moderate- and low-income households. Pet. App. E. If a proposed project involves nine units or fewer, the developer may choose to pay an in-lieu fee instead. *Id.* at p. E-5. Petitioner Michael Mead was fully aware of the City's affordable housing requirements when he submitted an application to develop eight units on a lot in the City, but he has never complied with these requirements. He first asked the City Planning Commission to waive the requirement, then filed this litigation alleging a Fifth Amendment Taking when his request was denied.

Respondents respectfully submit that this Court should not grant review. There is no conflict between state courts of last resort on the actual issue presented in this case – whether a generally applicable legislative regulation that applies to all residential developers in the City and does not require a dedication of property or a fee in lieu of a dedication is a land-use exaction subject to the limited takings test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Petitioner's attempts to recast and distort the issues and craft a division among state courts of last resort are designed to create the illusion of a significant national issue which is simply not presented by

this case. The Ninth Circuit's ruling is completely consistent with this Court's body of takings jurisprudence, recently addressed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). The Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

On or about September 2006, Petitioner Michael Mead applied to the Planning Commission of the City of Cotati for a permit to build four duplexes for a total of eight residential units. ER, Vol. 2, Tab 3, Complaint, p. 0053, ¶ 12. A few days before the Planning Commission hearing on his application, Petitioner sent a letter to the Planning Commission asking it to waive one of the "Conditions of Approval" in Exhibit A to the Planning Commission's Resolution, Condition 8 which requires Petitioner to mitigate for impacts to the California Tiger Salamander, a state and federally protected species,[1] and to waive the provisions in the City's zoning ordinance which requires residential developers to provide a percentage of units that would be affordable for moderate- to low-income households. ER, Vol. 2, Tab 3, Complaint, p. 0055, ¶ 19. By Resolution No. 08-05 dated January 28, 2008 ("the Resolution"), the Cotati Planning Commission approved Petitioner's project, but it did not

[1] The Petition does not seek review of the Ninth Circuit's decision rejecting Petitioner's challenge to Condition 8 for the California Tiger Salamander based on ripeness grounds.

waive Condition 8 or the City's affordable housing requirements. ER, Vol. 2, Tab 3, Complaint Exhibit F, Resolution, pp. 0098, 0100.

Petitioner did not appeal this decision to the City Council. Instead, several months after his project was approved, he sent a letter to the City complaining that the affordable housing requirements constituted a taking of his property under *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374.[2] ER, Vol. 2, Tab 3, Complaint Exhibit G, pp. 0109-0112. The City rejected Petitioner's allegation and explained that the affordable housing requirements were not an exaction and were not subject to *Nollan/Dolan* review. ER, Vol. 2, Tab 3, Complaint Exhibit H, pp. 0115-0116. The City also pointed out that Petitioner's claim was barred because he had failed to file a timely appeal of the Planning Commission's decision to the City Council and, as a result, had failed to exhaust his administrative remedies or ripen his takings claim. *Id.*

The affordable housing ordinance allows a residential developer such as Petitioner to either provide 20 percent of the proposed units restricted for occupancy by moderate- to low-income households, or, if the proposed development has nine or fewer units, he could elect to pay an in-lieu fee instead. Pet. App. E, E-2 to E-5. The ordinance does not require a developer to dedicate property to the City. Pet. App. E.

---

[2] Petitioner also raised challenges to Condition 8, but those will not be addressed here since Petitioner has not sought review of the Ninth Circuit's ruling on that issue.

After another round of letters on the same issues, Petitioner filed a complaint in the United States District Court for the Northern District of California seeking declaratory and injunctive relief, but not compensation, for an alleged Fifth Amendment taking and other constitutional allegations. ER, Vol. 2, Tab 3, Complaint, pp. 0065-0066. The District Court found Petitioner's claims were not ripe for review because he had not satisfied either prong of the ripeness test established by this Court in *Williamson County Regional Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 187-188 (1985). Under *Williamson County*, a takings claim is not ripe until (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue and (2) the plaintiff has sought compensation through the procedures the state has provided. *Id.* at 186-187. The District Court found that the second prong of this test was clearly not met because Petitioner had admittedly not sought compensation through state procedures. Pet. App. B at B-15 to B-21. The Court also noted in a footnote that the affordable housing requirements were not an exaction. Pet. App. B at B-30 n. 9.

Petitioner appealed to the Ninth Circuit. The Court of Appeals assumed the case was ripe in order to reject Petitioner's takings claim on the merits. Pet. App. A at A-4. The Court explained that Petitioner had multiple options for complying with the City's affordable housing requirement, one of which was to pay an in-lieu fee. The Court then held that a

generally applicable development fee is not an adjudicative land-use exaction subject to the *Nollan* and *Dolan* tests. Pet. App. A at A-4 to A-5. The Court of Appeals opinion is unpublished.

On December 21, 2010, Petitioner filed a petition to seek review from this Court on only his takings claim pertaining to the City's affordable housing ordinance. Petition, p. i.

REASONS FOR DENYING THE PETITION

I. THE PETITION MISCHARACTERIZES THE HOLDING OF THE NINTH CIRCUIT AND THE ISSUES PRESENTED BY THIS CASE

Petitioner misconstrues the decision of the lower court and the legal framework of this case in an attempt to meet the threshold requirements for review by this Court. This case does *not* involve an exaction or a required physical dedication of property by a governmental entity. Petitioner is a residential developer whose development proposal was approved by the City subject to his compliance with the City of Cotati's affordable housing regulations, generally applicable legislative regulations that apply to all residential developers in the City. ER, Vol. 2, Tab 3, Complaint, p. 0055, ¶ 21.

The City's affordable housing provisions are designed to implement the Housing Element of the City's General Plan, to offset the demand on housing created by new development, and to mitigate the

environmental and other impacts that accompany new development by protecting the economic diversity of the City's housing stock, by reducing traffic, transit and related air quality impacts, by promoting jobs/housing balance and by reducing the demand placed on transportation infrastructure in the region. Complaint Exhibit A, Affordable Housing Requirements, Section 17.31.010 – Purpose, Pet. App. E at E-1 to E-2; SER, Vol. 3, Tab 2, RFJN Exhibit F, Ordinance No. 766, ¶ 26, p. 0250. Pursuant to Section 17.31.020, each residential development shall be designed and constructed to provide at least 20 percent of the total units as inclusionary units restricted for occupancy by moderate-, low- or very low-income households. Pet. App. E at E-2. This Section does not require a developer to dedicate the affordable units to the City, but simply to offer them for sale or rent at an affordable price. Section 17.31.050 provides an alternative process of payment of an in-lieu fee for residential developments of nine or fewer units such as Petitioner's proposed project. *Id.* at E-5. The City also provides an "In Lieu Fee Schedule" that identifies the requisite fee for individual developments based on their sales price projections. *Id.* at E-20.

Section 17.31.060 permits a developer to propose an alternative means of compliance with the City's Affordable Housing Plan, such as construction of inclusionary units off-site, land dedications for construction of inclusionary units, or a combination of a variety of these options. *Id.* at E-6. Section 17.31.110 provides that the requirements of Chapter 17.31 may be adjusted or waived if the developer demonstrates

to the City Council by the presentation of substantial evidence that applying the requirements of the Chapter would take property in violation of the U.S. or California Constitutions. *Id.* at E-15. Finally, Section 17.84.030(B) provides that a Planning Commission decision can be appealed if filed within 10 calendar days of the date of the decision. SER, Vol. 3, Tab 2, RFJN Exhibit G, Municipal Code Section 17.84.030 ("Appeals"), pp. 0269-0270.

Petitioner did not propose any inclusionary units as part of the proposed project, nor did he choose to pay an in-lieu fee or submit an alternative proposal to the City to comply with the City's affordable housing ordinance. ER, Vol. 2, Tab 3, Complaint, p. 0055, ¶¶ 19 and 20. Petitioner did not seek an adjustment or waiver of these provisions through an appeal to the City Council. Pet. App. B at B-16. Petitioner did not file an action in state court claiming the City's regulation had caused a taking of his property and seeking just compensation. ER, Vol. 2, Tab 3, Complaint, p. 0058, ¶ 33. Instead, Petitioner filed this lawsuit in federal district court seeking *only* declaratory and injunctive relief, *not* compensation, for a Fifth Amendment taking and other alleged constitutional violations.[3] ER, Vol. 2, Tab 3, Complaint, p. 0065.

---

[3] As this Court has repeatedly recognized, the Takings Clause does not prohibit the taking of private property by the government, rather it requires that the landowner be compensated if a taking occurs. *Lingle*, 544 U.S. 528, 537-538; *see also* the Takings Clause of the Fifth Amendment. Petitioner's complaint ignores this basic limitation in seeking solely injunctive and declaratory relief for its takings claim.

As Justice Holmes explained in *Pennsylvania Coal,* and as this Court has unequivocally affirmed for more than eighty-five years, government regulation, by definition, often involves impacts on private property and adjustment of rights for the public good and it is only when a regulation goes *too far* that it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle*, 544 U.S. 528, 537-538; *Andrus v. Allard*, 444 U.S. 51, 65 (1979). A plaintiff who seeks to challenge a government regulation on the grounds that it has caused an uncompensated taking of private property may proceed under one of four theories: (1) the regulation requires a property owner to suffer a permanent physical invasion of the property, (2) the regulation deprives the property owner of all economically beneficial use of the property, (3) a general regulatory takings challenge subject to the *Penn Central* framework, or (4) a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. *Lingle*, 544 U.S. 528; *McClung v. City of Sumner,* 548 F.3d 1219, 1225 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2765 (2009); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

There is no dispute that the first two tests are not applicable in this case because Petitioner did not allege either a permanent physical invasion or the loss of all economically beneficial use of the property.

ER, Vol. 2, Tab 3, Complaint, p. 0050. Traditionally, when the impact of a regulation does not involve a permanent physical occupation or the loss of all economically beneficial use of the property, yet it places burdens on a property owner that a landowner believes "goes too far," courts resort to the *Penn Central* framework, the third test outlined above, to determine whether a taking has occurred. *Lingle*, 544 U.S. at 528-529, 538. Since this case involves the application of a generally applicable, legislatively adopted regulation requiring residential developers to provide a small percentage of affordable units or, in the alternative, pay an in-lieu fee to be used by the City to provide affordable housing, the Court of Appeals correctly found that the *Penn Central* framework is the proper test for determining whether the government had taken Petitioner's property. ER, Vol. 2, Tab 3, Complaint, p. 0053 and Pet. App. E; Pet. App. A at A-4 to A-5.

The final regulatory takings test identified in *Nollan* and *Dolan* is limited in application to special circumstances involving adjudicative land-use exactions. *See Lingle*, 544 U.S. at 538, 546-547. Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to government demands that the landowners dedicate an easement allowing public access to their property as a condition of obtaining a development permit. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. In each case, this Court began with the premise that had the government simply appropriated the easement in question, it would have been a per se

physical taking. *Lingle*, 544 U.S. at 546. If appropriation of an easement would be a physical taking, the government cannot force a landowner to give up the right to receive payment of just compensation for the taking by making dedication of the easement a condition of development. *Id.* at 546-547 (explaining that the situation presented in *Nollan* and *Dolan* involves a special application of the "doctrine of unconstitutional conditions"); *see also McClung v. City of Sumner*, 548 F.3d at 1227; *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-380. This Court has repeatedly held that it is only in these limited, special circumstances involving land-use exactions that the *Nollan* and *Dolan* framework applies. *Lingle*, 544 U.S. at 546-547; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

In an effort to draw this case within the limited *Nollan/Dolan* framework, Petitioner now argues that the City's affordable housing requirement – that he provide at least 20 percent of the total units as inclusionary units restricted for occupancy by moderate-, low- or very low-income households – is a physical dedication of property. Petition, p. 7. This assertion is utterly false. There is no transfer of property or any property rights from Petitioner to the City if Petitioner complies with the regulation and provides 20 percent of the units which are affordable to middle- to low-income households.

Taking Petitioner's theory to its logical endpoint, any regulation that resulted in a reduction of profits to a developer would be considered a physical

dedication of property. This argument is nonsensical and it would result in the wholesale expansion of the *Nollan/Dolan* test to all regulatory takings situations. The exception, currently limited to special circumstances involving adjudicative land-use exactions, would swallow the rule.

Petitioner also claims that the in-lieu fee option (if a developer chooses not to provide inclusionary units) is an exaction because it is a fee in lieu of a physical dedication and thus should be subject to the "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan*. ER, Vol. 1, Tab 3, Complaint; Petition, p. 7. Relying on this Court's direction regarding the limited application of *Nollan/Dolan* and the facts of this case, the Court of Appeals correctly held that a generally applicable development fee that does not involve dedication of land or a fee in lieu of land dedication is *not* an exaction; therefore, it is subject to the fact-specific inquiry of the *Penn Central* framework.[4] *McClung v. City of Sumner*, 548 F.3d at 1225; *Lingle*, 544 U.S. at 538-539, 546-547; Pet. App. A at A-4 to A-5.

The Petition contorts and misstates the issues addressed by the Ninth Circuit – the City's regulation does not require a dedication of real property, the regulation is not a land-use exaction, and there has been

---

[4] The Pacific Legal Foundation sought a writ of certiorari on this very question recently in *McClung v. City of Sumner*, but this Court denied that request. *McClung v. City of Sumner*, 548 F.3d 1219, *cert. denied*, 129 S.Ct. 2765 (2009).

no finding by any court that the conditions on development would be struck down under *Nollan* and *Dolan*. For this reason alone, the Petition should be denied.

II. PETITIONER GROSSLY OVERSTATES THE NATIONAL SIGNIFICANCE OF THIS CASE

Petitioner goes to great lengths in his Petition to make the Ninth Circuit's decision seem expansive, ground breaking and controversial when it merely applies settled law. As discussed above, this case does not involve an exaction or a dedication of land. As this Court noted in *City of Monterey*, 526 U.S. 687, 702, it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 722 n. 11 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) (noting that the *Nollan/Dolan* framework applies to "land-use decisions conditioning approval of development on the dedication of property to public use" and "is inapposite to regulatory takings cases outside [this] context").

Petitioner cites to two groups of cases from state courts of last resort which he claims conflict on their application of the *Nollan* and *Dolan* test to the issues presented in this case. Petition, pp. 9-14. With the

exception of one case from Texas,[5] decided before the *Lingle* decision, *all* of the cases cited by Petitioner are in concert on the issue which was actually presented in this case – the *Nollan/Dolan* test *does not apply* to a generally applicable, legislatively adopted regulation that does not involve dedication of land or a fee in lieu of land dedication. *See Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) (*Dolan* test applies only when the government demands either a physical dedication or a fee in lieu of a physical dedication); *Trimen Development Co. v. King County*, 124 Wash.2d 261, 877 P.2d 187, 191 (Wash. 1994) (same); *City of Olympia v. Drebick*, 156 Wash.2d 289, 126 P.2d 802 (Wash. 2006), *cert. denied*, 549 U.S. 988 (2006) (same); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 822 N.E.2d 1214 (N.Y. 2004) (a regulation which restricts an owner's use of his property or places conditions on development without a dedication of property to public use is not an exaction and *Nollan/Dolan* does not apply); *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429, 444 (Cal. 1996), *cert. denied*, 519 U.S. 929 (*Nollan/Dolan* is not applicable to generally applicable development fees or assessments from legislative processes).

The cases Petitioner claims are in conflict with these decisions in actuality are completely consistent

---

[5] *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 635 (Tex. 2004).

with both other state court opinions and the Ninth Circuit decision in this case as to this issue. *See Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (S.C. 2001) (*Nollan/Dolan* only applies to situations involving physical dedications of property); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (*Nollan/Dolan* test is limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (*Dolan* test does not apply to a generally applicable legislative decision by the city); *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (Kan. 1995) (*Dolan* test does not apply to imposition of an impact fee to address traffic impacts from development when fee is not related to a dedication of land); *Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (Md. 1994) (*Dolan* inapplicable because the challenged regulation was imposed by legislative enactment, not by adjudication, and the tax did not require landowners to deed portions of their property to the county). Petitioner concedes this fact later in his petition when he admits that *Town of Flower Mound*, 135 S.W.3d 620, 635, is the *only* decision from a state court of last resort or a circuit court to expand *Nollan/Dolan* beyond the context of adjudicatory land-use exactions and apply it to legislatively imposed conditions such as the

affordable housing requirements challenged here. Petition, pp. 20-21.

Petitioner's argument is illusory. There is simply no split or conflict between the Ninth Circuit's decision in this case and decisions from state courts of last resort, nor is there any conflict between the Ninth Circuit's decision and decisions of this Court. *See* Petition; *see also West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 240 P.3d 29 (Or. 2010). Therefore, there is no jurisdictional basis for the Petition under Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD R. RUDNANSKY
JULIA A. BOND
DAWN A. MCINTOSH
Counsel of Record
MEYERS, NAVE, RIBACK, SILVER & WILSON

Attorneys for Respondents City of Cotati and Planning Commission of the City of Cotati

180 (3)

No. 10-828

In the Supreme Court of the United States

MICHAEL MEAD, PETITIONER

v.

CITY OF COTATI, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

ALLEN M. BRABENDER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner has stated a claim for which relief may be granted against the municipal respondents under the Fifth and Fourteenth Amendments to the United States Constitution.

In the Supreme Court of the United States

No. 10-828

MICHAEL MEAD, PETITIONER

v.

CITY OF COTATI, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the *Federal Reporter* but is reprinted in 389 Fed. Appx. 637. The opinion of the district court (Pet. App. B1-B32) is unreported, but is available at 2008 WL 4963048.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2010. A petition for rehearing was denied on August 30, 2010 (Pet. App. D1-D2). On November 22, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to December 23, 2010, and the petition was filed on December 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns contiguous vacant lots in Cotati, California, totaling 1.6 acres. Pet. App. B2. He applied to the City of Cotati's Planning Commission (Commission) for a permit to build four residential duplex units on 0.9 acres of his property. *Ibid.* The Commission approved his building permit subject to two conditions: (i) that he comply with an affordable-housing requirement that the City of Cotati's municipal code imposed on new construction projects; and (ii) that he implement, consistent with advisory guidelines promulgated by the U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game, measures to mitigate the impact on the California tiger salamander, a species protected by the federal Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Pet. App. B2-B4.

2. Petitioner filed this suit in the Northern District of California, challenging the conditions that the City of Cotati placed upon his building permit. Pet. App. B4. In Count I of his complaint, the only count raising a claim against a federal defendant, petitioner alleged that FWS, along with the City of Cotati, the Commission, and the California Department of Fish and Game, had taken his property without just compensation, in violation of the Fifth and Fourteenth Amendments. Petitioner contended that the two conditions that the City placed upon his building permit (of which only the salamander-mitigation condition had any connection with FWS) failed to satisfy the "essential nexus" and "rough proportionality" requirements for land-use exactions that this Court established in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 386-396 (1994). Pet. App. B4-B5. Petitioner sought both a declaration that the

affordable-housing and salamander-mitigation conditions effected an unlawful taking of his property and a permanent injunction to prohibit the defendants from applying those conditions to his building permit. *Id.* at B8. Petitioner did not seek, and has never sought, compensation for the alleged taking. *Ibid.*

3. The district court dismissed the complaint without prejudice to re-filing. Pet. App. B1-B32. The court concluded that petitioner's takings claim against FWS was "not ripe for review because a taking is not unconstitutional unless it is uncompensated, and he has not yet sought compensation." *Id.* at B9. "The fact that he seeks a declaratory judgment and equitable relief does not alter this analysis," said the court, "because the Court cannot declare that an unconstitutional taking has occurred—let alone order injunctive relief—until it can determine that [petitioner] was not given just compensation for the taking." *Ibid.* The district court accordingly "conclude[d] that it lack[ed] jurisdiction to adjudicate [petitioner's] takings claim against the United States" at that time. *Id.* at B14. The district court dismissed the claim against FWS "without prejudice to re-filing after [petitioner] has first sought compensation for the alleged taking." *Id.* at B31.

For similar reasons, the district court concluded that petitioner's takings claim against the state and city defendants was not ripe for adjudication in federal court because petitioner had never attempted to seek compensation through the state procedures available to him. Pet. App. B15-B21. The district court dismissed those claims without prejudice as well. *Id.* at B32.

4. The court of appeals affirmed in a short, unpublished disposition. Pet. App. A1-A5.

The court of appeals concluded that petitioner's takings claim against FWS and the California Department of Fish and Game was not ripe for review because petitioner had never sought, nor received, a final determination from those agencies on whether the tiger salamander-mitigation conditions applied to his property. Pet. App. A3-A4.

The court of appeals also rejected petitioner's challenge, made solely against the City of Cotati and the Commission, to the City's affordable-housing requirements. Pet. App. A4-A5. Assuming, without deciding, that the claim against those municipal defendants was ripe, the court nevertheless concluded that petitioner had failed to state a claim upon which relief could be granted, because he "ha[d] several options for complying with the affordable housing requirement, one of which is to pay an in-lieu fee." *Id.* at A4. The court of appeals noted that "[a] generally applicable development fee [such as the one authorized by the City's affordable-housing provision] is not an adjudicative land-use exaction subject to" the essential-nexus and rough-proportionality requirements explained in *Nollan* and *Dolan*. *Ibid.* The court of appeals stated that petitioner's challenge should have been brought under "the fact-specific inquiry developed by the Supreme Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978)," and that petitioner had not alleged facts that would satisfy the *Penn Central* inquiry. Pet. App. A5.

5. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. D2.

DISCUSSION

The petition abandons the challenge to the tiger salamander-mitigation condition, Pet. 3-4 nn.1-2, and pursues only the challenge to the City of Cotati's affordable-housing condition. Petitioner thus has chosen not to pursue his only claim against FWS, the sole federal respondent. Accordingly, although this Court has called for the respondents to file responses to the petition for a writ of certiorari, the federal respondent takes no position regarding the petition. The only questions presented by the petition are more appropriately addressed by the municipal respondents at this stage.

CONCLUSION

The federal respondent takes no position regarding the petition.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
ALLEN M. BRABENDER
Attorney

APRIL 2011

No. 10-828

Supreme Court, U.S.
FILED
APR 26 2011

In the

Supreme Court of the United States

MICHAEL MEAD,

Petitioner,

v.

CITY OF COTATI a municipal corporation; PLANNING COMMISSION OF THE CITY OF COTATI; UNITED STATES FISH AND WILDLIFE SERVICE; and DONALD KOCH, in his capacity as Director of the California Department of Fish and Game,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO CITY OF COTATI AND PLANNING COMMISSION OF THE CITY OF COTATI'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MERIEM L. HUBBARD
Counsel of Record
PAUL J. BEARD II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org
E-mail: mlh@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), require that conditions on development be related in nature and extent to the projected impact of a proposed development.

1. Does a land-use exaction that would be struck down as an unconstitutional condition under *Nollan* and *Dolan* if it is imposed as a required dedication of real property, become constitutional if the property owner is given the option of ransoming his land by offering a monetary payment to the government?

2. Does a land-use exaction that would be struck down as an unconstitutional condition under *Nollan* and *Dolan* if it were adjudicatively imposed upon a single individual, become constitutional if it is legislatively imposed upon all similarly situated property owners?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. MR. MEAD'S PETITION DEMONSTRATES A CLEAR CONFLICT AMONG STATE HIGH COURTS 2

A. The City's Affordable Housing Condition Is an Exaction 3

B. A Requirement That Mr. Mead's Units Remain as Affordable Housing for at Least 30 Years Is a Transfer of Property to Further the City's Affordable Housing Policy 4

II. CITY FAILS TO RECOGNIZE THAT JURISDICTIONAL REQUIREMENTS ARE MET WHEN PETITIONER SEEKS RESOLUTION OF AN IMPORTANT QUESTION OF FEDERAL LAW 5

III. MR. MEAD'S REGULATORY TAKINGS CLAIM IS RIPE 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

City of Monterey v. Del Monte Dunes at Monterey, Ltd. (Del Monte Dunes), 526 U.S. 687 (1999) 6-7

City of Olympia v. Drebick, 83 P.3d 443 (Wash. 2004) 7

Dolan v. City of Tigard, 512 U.S. 374 (1994) 1, 3-4, 7, 10

Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998) 6

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 6

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1, 5, 8

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010) 9

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 9

Village of Norwood v. Baker, 172 U.S. 269 (1898) 3

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9

Statutes

Cal. Gov't Code § 66020 10

TABLE OF AUTHORITIES—Continued

Page

Rule of Court

Supreme Court Rule 10(c) 5

Miscellaneous

City of Cotati Muni. Code, 17.31.040 4

Huffman, James L., *Colloquium on Dolan: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit: Dolan v. City of Tigard: Another Step in the Right Direction*, 25 Envtl. L. 143 (1995) 2

Sonagi, Margaret, *Exactions and Impact Fees in California* (Solano Press 2001) 3

Petitioner Michael Mead respectfully files this reply to the opposition to Petition for Writ of Certiorari (Opp.) filed by Respondent City of Cotati and Planning Commission of the City of Cotati.[1]

INTRODUCTION

Respondent City of Cotati claims that "[t]aking petitioner's theory to its logical endpoint, any regulation that resulted in a reduction of profits to a developer would be considered a physical dedication of property." Opp. at 10-11. In fact Mr. Mead's claim has nothing to do with reduced profits. Mr. Mead's argument is this: the City cannot hold a building permit hostage until Mr. Mead agrees to dedicate low-income housing, or fees in-lieu thereof, for no other reason than to further the City's affordable housing program. This Court should accept this case for review in order to make it clear that conditions such as this are subject to the standards set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

A ruling that the *Nollan* and *Dolan* standards apply to legislatively imposed exactions involving the dedication of an interest in property, or fees in-lieu thereof, would not "result in the wholesale expansion of the *Nollan/Dolan* test to all regulatory takings situations." Opp. at 11. Rather, such a ruling would represent a significant step towards advancing the broader constitutional takings principles intended to

[1] The Federal Respondent—the U.S. Fish and Wildlife Service—filed a Memorandum explaining that it takes no position on the Petition. Memorandum for the Federal Respondent at 5.

prevent a minority of citizens from shouldering a disproportionate share of public burdens. "The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."[2]

I

MR. MEAD'S PETITION DEMONSTRATES A CLEAR CONFLICT AMONG STATE HIGH COURTS

Mr. Mead's first question arises from a split among state high courts as to whether the payment of a fee in-lieu of dedication of real property is subject to the nexus and rough proportionality tests of *Nollan* and *Dolan*. Mr. Mead demonstrates a clear conflict by summarizing various state court decisions that do not permit government to dodge the *Nollan/Dolan* standards by allowing payment of a fee in-lieu of dedication, and others that refuse to apply the nexus and rough proportionality tests to all forms of monetary exactions. Petition at 9-14. City chooses to ignore this conflict, instead arguing that its affordable housing regulation is (1) not a land-use exaction, and (2) does not require dedication of real property or a fee in-lieu thereof. Opp. at 1, 5, 6, 11.

---

[2] James L. Huffman, *Colloquium on Dolan: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit: Dolan v. City of Tigard: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995).

A. The City's Affordable Housing Condition Is an Exaction

The requirement that builders further the City's affordable housing policy by dedicating 20% of their proposed units to below-market housing, or paying a fee in-lieu of dedication, is an exaction. Exactions are defined in the literature as "[t]he process by which developers are required, as a condition of development approval, to dedicate sites for public or common facilities; construct and dedicate public or common facilities . . . make payments to defray the cost . . . of facilities . . . or otherwise provide . . . public amenities." Margaret Sonagi, *Exactions and Impact Fees in California* 15 (Solano Press 2001).[3] A builder who satisfies the City's ordinance by actual construction will be dedicating property at a below-market price when he sells or rents the units.

City cannot avoid *Nollan* and *Dolan* by claiming that landowners may pay an in-lieu fee instead of building low-income housing. As this Court explained in *Village of Norwood v. Baker*, an exaction may require the dedication of land or a real property interest, the payment of fees, or the financing of public improvements. *See* 172 U.S. 269, 279 (1898) (referring to an assessment against property for improvements to abutting road as an exaction). And many of the cases relied upon by the *Dolan* majority in formulating its "roughly proportional" nexus test involved fees: "All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of

---

[3] The City must believe that the in-kind requirement (constructing the unit), land dedication, and the in-lieu fee are effectively the same—otherwise the ordinance would not allow compliance through these methods.

the entire parcel . . . or an equivalent value in cash." 512 U.S. at 400 (Stevens, J., dissenting).

The Ninth Circuit Court recognized the affordable housing condition as an exaction, saying only that "[a] generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests of *Nollan* . . . and *Dolan*." Petitioner's Appendix (Pet. App.) A-4 (citations omitted).

B. A Requirement That Mr. Mead's Units Remain as Affordable Housing for at Least 30 Years Is a Transfer of Property to Further the City's Affordable Housing Policy

City seeks to escape the meaningful judicial review required by *Nollan* and *Dolan* by adopting a narrow view of what constitutes "a dedication of property." City claims that its affordable housing requirement is not an exaction because it does not require a property owner to transfer property or any property rights to the City. Opp. at 3, 6. The ordinance provides as follows:

> Inclusionary units produced in compliance with this chapter shall be legally restricted to occupancy by households of the income levels for which the units were designated, for a minimum of thirty years from the date of first occupancy for rental units, and . . . the date of each sale of any affordable unit for owner-occupied units.

City of Cotati Municipal Code, 17.31.040. Pet. App. E-5.

Here, as in *Nollan v. California Coastal Commission*, government appropriates the right to determine how a portion of the property will be used—a right that formerly inhered in the owner as an element of his "bundle of rights." In *Nollan*, the government demanded that the Nollans allow the public to traverse the beachfront portion of their private property. *Nollan*, 483 U.S. at 827-28. Here, the government demands that Mr. Mead allow a portion of his property to be used as affordable housing for no less than 30 years. The ordinance destroys the fundamental right to freely alienate a portion of the property by telling Mr. Mead to whom to sell or rent his property and how much to charge in sales price or rental. It is this appropriation of the use-right that makes the condition of development an exaction, not the formal transfer of title. Thus, it is appropriate to ask whether the use the government wants to impose on part of the property is reasonably related to the use the property owner proposes.

II

CITY FAILS TO RECOGNIZE THAT JURISDICTIONAL REQUIREMENTS ARE MET WHEN PETITIONER SEEKS RESOLUTION OF AN IMPORTANT QUESTION OF FEDERAL LAW

The Ninth Circuit Court held that *Nollan* and *Dolan* do not apply when conditions on development are imposed by legislation of general applicability. Pet. App. A-4. That holding raises "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c); Petition at 20-21. City's argument centers around a belief that

this Court has resolved the issue, but that is not true. *See, e.g., Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) ("[T]he Supreme Court has left unsettled the question whether *Dolan*'s rough proportionality test applies to legislative, as opposed to administrative exactions. Lower courts and commentators have also struggled to determine whether the test applies to fee exactions . . . ." (footnote omitted)).

This Court has ruled on only two exactions cases—*Nollan* and *Dolan*. The viability of the *Nollan/Dolan* takings tests in the context of development exactions generally was confirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) ("[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."). But this clarification does not address the applicability of *Nollan* and *Dolan* to legislatively imposed exactions, and the question remains unanswered.

City cites *City of Monterey v. Del Monte Dunes at Monterey, Ltd. (Del Monte Dunes)*, 526 U.S. 687, 702 (1999), in support of its claim that this Court has repeatedly limited *Nollan* and *Dolan* to land-use exactions requiring the dedication of property to public use. Opp. at 10, 12. *Del Monte Dunes* does not even address the issue of excessive exactions. In that case, the question was whether *Dolan*'s rough proportionality test extends to permit denials. In *Dolan*, the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate

amount by which a bicycle trail could reduce the impact. But such an approach is not helpful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest—after all, it is difficult to determine whether a permit denial is roughly proportional to anything. As this Court said, the proportionality standard

> was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is *based not on excessive exactions but on denial of development*. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

Del Monte Dunes, 526 U.S. at 703 (emphasis added). *See City of Olympia v. Drebick*, 83 P.3d 443, 451 (Wash. 2004) ("[A] *Dolan* proportionality analysis was inapposite in *Del Monte Dunes* because the government did not exact land or money.").

The refusal of lower federal courts and state courts to apply the nexus and rough proportionality tests to legislatively imposed conditions on development conflicts with this Court's decisions in *Nollan* and *Dolan*. *See* Petition at 21 (noting that *Nollan* and *Dolan* both involved conditions applied to new development generally). And, all but one of the cases relied on by the *Dolan* majority in formulating the "rough proportionality" test involved municipal ordinances—legislation of general applicability—requiring developers to dedicate property or cash to help finance the construction of public facilities. *See Dolan*, 512 U.S. at 400 (Stevens, J., dissenting).

Both *Nollan* and *Dolan* support the view that the constitutional infirmity results, not from the precise nature of an exaction, but rather from the lack of an adequate nexus between an exaction and the use of property. Without a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property, a permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted). Thus, when the court of appeal below found that the nexus standard of *Nollan* and the rough proportionality test of *Dolan* apply only to nonlegislatively imposed exactions of real property, it wrongly focused its attention entirely on the nature of the exaction, when it should have focused on the impediment that is being imposed on the exercise of a constitutional right. In other words, what is unconstitutional is that a landowner is forced to undertake an involuntary action that is not related in any real degree to any impact caused by the proposed use of the land. The particular type of involuntary action and the manner of imposition is far less important to the analysis than is the lack of nexus and proportionality.

This Court should grant review to explain the true reach of the Takings Clause.

III

MR. MEAD'S REGULATORY TAKINGS CLAIM IS RIPE

The Ninth Circuit Court properly exercised its prudential jurisdiction by assuming without deciding that the case was ripe. Pet. App. A-4. *See, e.g.*,

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725,738-39 (1997) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)). And this Court recently held that compliance with the second prong of *Williamson County*—"seeking compensation through state procedures"—is not jurisdictional. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 2610 (2010).

City misses the mark when arguing that "[t]he District Court found Petitioner's claims were not ripe for review because he had not satisfied either prong of the ripeness test . . . in *Williamson County*." Opp. at 4. In fact, the district court ruled that "[t]he City's decision is 'final' because Plaintiff has been told how he will be allowed to develop his property." Pet. App. B-16, 17.

Mr. Mead did not seek compensation in state or federal court, for the simple reason that, in exactions cases, the deprivation of property does not occur until such time as the property owner is forced to comply with the condition on development. In other takings tests, which focus on the impact of regulation on the use of property, the deprivation occurs when the decision limiting the use of property is final. Exactions cases are different because the deprivation of property does not occur until the property owner is forced to comply with the exaction at some time after permit approval and before issuance of a building permit. Put another way, the deprivation is dependent upon an affirmative act by the property owner.

Mr. Mead has not complied with the affordable housing condition, has not received a building permit, and has not begun to build the proposed development.

Yet, the applicable statute of limitation and rules of accrual required that he formally object to the affordable housing condition within 90 days of approval of his development project, and file a lawsuit 90 days later. Cal. Gov't Code § 66020. For these reasons, Mr. Mead does not seek compensation, but requests only declaratory and injunctive relief.

City's position that the only remedy available to Mr. Mead is just compensation, Opp. at 7, has not been adopted by this Court. Neither the Nollans nor Mrs. Dolan dedicated any property before seeking to have the conditions on their projects ruled unconstitutional. Justice Stevens, dissenting in *Dolan*, argued that the case was premature because no taking had yet occurred, so there was no infringement on the constitutional right to compensation. *See Dolan v. City of Tigard*, 512 U.S. at 408 (Stevens, J., dissenting). But the majorities in *Nollan* and *Dolan* recognized that a taking had occurred and declared the conditions unconstitutional.

CONCLUSION

For these reasons the petition should be granted.

DATED: April, 2011.

Respectfully submitted,

MERIEM L. HUBBARD
Counsel of Record
PAUL J. BEARD II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mlh@pacificlegal.org

Counsel for Petitioner